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Supreme Court of the United States

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LARRY KNOHL,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

LARRY KNOHL,

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against

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Larry Knohl, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered June 22, 1967. The opinion of the Court of Appeals is printed in the Appendix to this petition (A1-28).*

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1967 (A29) and a timely petition for a rehearing was denied on July 17, 1967 (A30). The time to file this petition was extended from August 16, 1967 to September 15, 1967, by order of Mr. Justice Fortas, dated August 11, 1967 (A31).

The jurisdiction of this Court is invoked under 28 U. S.C. § 1254(1).

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* References to the Appendix will be preceded by the letter "A". All references without such designation will be to petitioner's Appendix in the Court of Appeals.

Questions Presented

1. Whether a defendant with conceded brain damage and neurologic deficits after a cerebral stroke, is entitled, as a matter of constitutional right, to an evidentiary hearing on the issue of his ability to stand trial and adequately assist his counsel in the preparation and trial of the case, including his ability to testify on his own behalf (Fifth and Sixth Amendments).

2. Whether the rule of this Court that an evidentiary hearing is required on writs of habeas corpus relating to a prisoner after conviction to determine his competency to stand trial applies equally to a defendant before trial (*Bishop* v. *U. S.*, 350 U. S. 961 [1956]; *Walker* v. *Johnston*, 312 U. S. 275 [1941]).

3. Whether an evidentiary hearing is required to determine ability to stand trial where the defendant is suffering from concededly serious illness and medical opinion is in conflict.

4. Whether a copy of a surreptitiously taken tape recording may be admitted in evidence without production of the original, in view of the known methods of altering and tampering with such devices, which can only be exposed by examination of the original; and whether the growing use of secret eavesdropping devices does not require such a minimum standard of trustworthiness.

5. Whether the minimum standard should not, in any event, require the Government at least to test the original tape for tampering and alteration to insure "the fairness of procedures" in accordance with the policy announced in *Berger* v. *New York* (388 U. S. 41, 56 [1967]).

6. Whether the Government has a duty to obtain and keep, by process or otherwise, for inspection by the defendant as to alteration or tampering, the original of a sur-

reptitious tape recording; and whether failure to perform its duty to preserve original evidence, recklessly and negligently, resulting in the loss of the original, precludes the introduction of a purported copy in evidence.

7. Whether the Government, consistent with the purpose of the new Rule 16(a), Federal Rules of Criminal Procedure, had the duty to disclose in advance of trial and make available for discovery by petitioner a secret tape recording of conversations of the petitioner; and whether such discovery by petitioner was a matter of right.

8. Whether under *Berger* v. *New York, supra,* a search warrant is not required for eavesdropping in a federal criminal investigation; whether the Fifth Amendment rights of the petitioner were not also violated in the circumstances set forth herein; and whether the status, as an agent of the Government, of a person making the secret recording should not have been submitted for determination to the trial jury.

Statutes Involved

The statute involved in the indictment is 18 U. S. C. § 1503. The statutes relevant to the issues presented herein are 18 U. S. C. § 4244, D. C. Code § 24-301(a) and (b), 28 U. S. C. § 2255 and Federal Rules of Criminal Procedure, Rule 16(a). The constitutional provisions involved are the Fourth, Fifth and Sixth Amendments to the United States Constitution. All are printed in the Appendix hereto (A32-38).

Statement

Petitioner was convicted in the United States District Court for the Southern District of New York, upon a jury verdict of guilty, of obstructing justice in violation of 18 U.S.C. § 1503, and was sentenced to the maximum prison term of five years. The specific charge, as alleged in the

indictment (5a) was that he endeavored to influence the testimony of one Mrs. Kay B. Fuller, a witness under subpoena to appear before a grand jury. The pertinent facts relating to the alleged corrupt endeavor may be briefly set forth as follows:

It was claimed that during the period August 6 through August 24, 1965, petitioner sought to use the said Mrs. Fuller to cash six United States treasury bills, allegedly stolen, each being in the amount of $100,000; and then have her deny before a grand jury that petitioner was the source of the bills.

Mrs. Fuller testified as to discussions with petitioner respecting the proposed transactions by her with the treasury bills. In particular, she spoke of mentioning to petitioner the possibility that she might have to justify such a large amount to the bank where the transactions were to be effected; that petitioner allegedly told her to say that one Kirby—her former employer and associate—gave them to her; that she told petitioner she could not do that because Kirby had been dead for a long time and six-month treasury bills were involved; that petitioner then allegedly asked her if she knew any other people who died recently; and that she then brought up the name of one Cy O'Neil, telling petitioner that she could tell the bank that she got them from O'Neil in the event they questioned her (122a).

Thereafter, Mrs. Fuller proceeded to cash certain of the treasury bills and make loans against others at the Chemical and Barclay Banks in New York City. On August 24, 1965, however, she was confronted by the FBI who informed her that the treasury bills were stolen (139a-40a, 256a-59a); and on the next day, August 25, she was served with a subpoena to appear before a grand jury which was investigating the theft of the treasury bills (143a).

A conference, crucial in the posture of the Government's case, took place on the day that the subpoena was served in Mrs. Fuller's apartment between herself, petitioner, and one Brodsky, an attorney whom she had retained to repre-

sent her in the matter. The highlight of this conference was that petitioner allegedly told Mrs. Fuller to tell the grand jury that she got the treasury bills from O'Neil and not to change her testimony—that a dead man can tell no tales (145a).

Mrs. Fuller made several surreptitious tape recordings of conversations with petitioner to which a substantial part of the trial was devoted. The principal recording—constituting the high point of the trial (introduced in evidence as Exhibit 48 and referred to as the "Brodsky" tape)—pertained to the conference of August 25 between Mrs. Fuller, Brodsky and petitioner (152a).

Reasons for Granting the Writ

Summary

1. The standard as to when an evidentiary hearing must be granted for determination of a defendant's mental and physical capacity to assist counsel, to stand trial and to testify in his own behalf require clarification and formal pronouncement by this Court for the guidance of the lower federal courts. We maintain that such a hearing is constitutionally required in advance of trial unless the application therefor is patently frivolous. This standard emerges from the decisions of this Court in *Pate* v. *Robinson* (383 U. S. 375 [1965]), *Bishop* v. *U. S.* (350 U. S. 961 [1956]), and *Dusky* v. *U. S.* (362 U. S. 402 [1960]), among others, as to which the court below failed to give due weight.

2. With particular reference to the decision in *Pate* v. *Robinson, supra,* the determination below severely circumscribes a defendant's constitutional right in holding that the procedures under 18 U.S.C. § 4244 (which precludes an evidentiary hearing in the event the court-appointed physician issues a certificate of competency) constitute the ex-

clusive remedy in the federal courts for determination of such matters. If the court below is correct, § 4244 is unconstitutional.

3. An anomalous distinction has been drawn between habeas corpus applications for determination of competency, where in accordance with the decisions of this Court (e.g., *Bishop* v. *U. S., supra,* and *Walker* v. *Johnston, supra*) a hearing must be granted unless the application is patently frivolous, and pre-trial applications with respect to competency hearings. The distinction between the standards for determination of such matter before trial and when a defendant is in custody after conviction should not be perpetuated.

4. A conflict exists with the decisions in the District of Columbia Circuit, which hold that an evidentiary hearing must be granted as to competency to stand trial if counsel for defendant or the Government objects to a court-appointed physician's finding of competency. We maintain that the procedure which obtains in the District of Columbia Circuit is constitutionally required.

5. The court below has distinguished between mental and physical competency to stand trial, applying different standards with respect to the determination of such issues. The distinction is artificial and can only create confusion and difficulty in the determination of such matters, leading to a denial of a defendant's constitutional rights.

6. A unique doctrine has also been applied below, which we believe is constitutionally unsound, in that it was held, contrary to the determination by this Court in *Pate* v. *Robinson, supra,* that a defendant's right to an evidentiary hearing on his mental and physical competency to stand trial may be waived where counsel merely consents, without more, to submit the defendant to physical examination by a court-appointed doctor.

7. Questions of first impression as to the standards required for insuring the "fairness of procedures" (*Berger* v. *New York, supra*), in connection with the admission in evidence of surreptitiously made tape recordings are presented for review. We maintain that a minimum standard, requiring the Government to produce the original tape recording in court, or at the very least, to test the original tape for tampering and alteration, should be imposed.

8. The decision below permitting the use of a purported copy of the surreptitious tape recording without the production of the original goes beyond the prior determinations in the Fourth, Fifth, Seventh and District of Columbia Circuits, where copies of tapes have been admitted, absent a concession as to authenticity, only when the original has been produced in court.

9. The grossly negligent conduct of the FBI in connection with the loss of the original tape recording, completely preventing its examination by petitioner, indicates the need for promulgation of a rule by this Court, requiring the Government to preserve original evidence by means of process or otherwise.

10. The court below has essentially revived the discredited "silver platter" doctrine by overlooking the fault of the Government officials in connection with the loss of original evidence.

11. Clarification of the new Federal Rule 16(a) is required for the guidance of the lower federal courts in two material respects: (a) The court below held that discovery of a defendant's statement is discretionary, contrary to the purport of the new rule and the policy expressed by this Court in *Dennis* v. *U. S.* (384 U. S. 855, 870 [1966]). (b) In dealing with surreptitious tape recordings, the existence of which a defendant cannot conceivably know before trial, a duty must be imposed upon the Government

at least to disclose its possession before trial so as to enable application for discovery by the defendant.

12. The reach of this Court's decision in *Berger* v. *New York, supra,* requires clarification. We maintain that, consistent therewith, a defendant's statements surreptitiously taken are now subject to Fourth Amendment protection, and, in this case, to Fifth Amendment protection as well.

ARGUMENT

I

The denial to petitioner of an evidentiary hearing to determine his competency to stand trial, assist counsel and testify in his own behalf, constituted a violation of his rights under the Fifth and Sixth Amendments.

This case in its pre-trial stages came on before no less than five Federal District Judges on at least eight separate occasions. On virtually each occasion counsel for petitioner emphasized petitioner's inability to stand trial and effectively assist counsel in preparation because of his debilitated condition, resulting from a severe stroke. Several applications for adjournment of the trial by reason of petitioner's condition were made, as well as application for a hearing on the issue. These applications were made both orally (9a-19a, 25a, 30a-35a, 49a, 97a-112a) and by way of formal motion (42a-83a). Petitioner relied upon the objective medical facts adduced as to his condition which took the form of several medical reports by eminent physicians and specialists who were treating petitioner for his various ailments (70a-78a, 82a-83a, 114a), affidavit by petitioner himself (27a-29a), as well as counsel's first-hand experience in attempting to prepare for trial under the circumstances, set forth both orally and in affidavit under oath (42a-54a).

No less than four District Judges (Frankel [34a-35a], Croake [49a], Herlands [96a] and Tyler [100a]) indicated that a plenary hearing was indicated on the issue, but deferred ultimate determination of the matter to the trial judge. Thus, Judge Frankel commented that

> "We discussed it in the past and we tended to agree that it might be a subject that would require an actual evidentiary hearing." (34a-35a)

Judge Herlands wrote:

> "In denying the present application, the Court is mindful of the fact that the trial judge possesses discretion to decide whether or not there should be a hearing of live medical witnesses in order to ascertain more precisely at the time of actual trial the state of defendant's health in relation to his ability to stand trial." (96a)

The trial judge, however, when the matter came before him, peremptorily refused to do so and instead ordered petitioner to trial. He ruled that

> "there has been enough medical testimony so far and Judge Herlands has considered the problem and it is for my discretion from here on in. I have exercised it and set the trial date for tomorrow, July 6th." (112a)

The Objective Medical Facts

There is no dispute on this record that petitioner—in the words of Judge Herlands, denying his formal application for a hearing (96a)—was a "very sick man" at the time of trial. The objective medical facts culled from the various medical reports presented to the court below show the following as to petitioner's condition:

1. *Brain damage:* Petitioner having suffered a major stroke approximately 6 months prior to the indictment in

this proceeding, sustained brain damage, the actual condition being variously described by the medical experts as "cerebral arteriosclerosis with a thrombotic lesion on the left side of the brain" (59a); "severe vascular disease of the brain, the eyes and the heart" (82a); "right hemiplegia" (74a) and "cerebral disease" (57a) with "neurologic deficits" (94a).

2. *Paralysis and general physical disability:* The right side of petitioner's body, including his face, was paralyzed. He was confined to a wheelchair with his arm in a sling and leg in a brace (28a, 59a, 71a, 74a). In an effort to ameliorate the effects of the paralysis, petitioner was undergoing physiotherapy at the Rusk Institute at the time of trial (65a).

3. *Hypertension and diabetes:* Petitioner was also suffering from a long-standing condition of dangerously high blood pressure, coupled with diabetes. The hypertension was the very condition which precipitated the major stroke; and at all pre-trial stages through the time of trial, his blood pressure was running at levels (up to 240/140) which were equal to those at the time he actually suffered the stroke (27a, 59a, 72a-76a). Apart from the very dangerous ramifications of the condition, rendering him susceptible to another stroke, petitioner was also inflicted with headache and dizziness (79a, 83a).

4. *Severe speech impediment:* A further result of the stroke with its attendant paralysis was a severe articulative difficulty under which petitioner labored, being characterized as "dysarthria", which substantially interfered with his ability to speak. The result was that he was constrained to talk "with his mouth twisted to the side" and his speech was slowed and slurred (57a, 65a, 74a, 105a). Petitioner was, at the very time of trial, undergoing speech training to help rectify the condition (65a).

5. *Severe pain and heavy medication:* Petitioner's condition gave rise to substantial pain, particularly intensive in his arm and leg, which constantly harassed him (25a-26a, 28a). In order to reduce the pain, and to help control the severe hypertension, as well as his other infirmities, petitioner was constrained to take heavy dosages of medication daily, consisting of no less than 26 pills each day, including orinase, cortisone, darvan, aspirins, blood pressure pills and tranquilizers (27a-28a, 80a, 90a). The effect of these heavy doses of medication, coupled with the pain, was to further impair petitioner's faculties, rendering him "woozy most of the time", as he stated in his affidavit to the court (28a).

The Medical Opinions

Petitioner was examined by two Court-appointed physicians, Doctors Brock and Clark. Their reports, printed in their entirety in the appendix below (56a-63a, 64a-69a, 84a-95a), admit to the objective medical circumstances hereinabove outlined. The first examination by Dr. Brock was in March 1966 in connection with another matter pending in the Eastern District of New York. Dr. Brock maintained in a conclusory manner, without providing significant basis for his conclusion, in the course of his review and recitation of petitioner's medical infirmities, that he was allegedly well-oriented, alert and responsive with a seeming absence of reduction in his ordinary intellectual capacities (57a, 59a). He concluded, however, that petitioner was unable to stand trial and suggested re-examination in 6 months, doubting, however, that there would even be sufficient improvement at that time to permit him to stand trial (59a).

Only two months later, however, Dr. Brock reversed his position and determined that petitioner, who appeared alert, responsive and cogent (65a) was physically able to stand trial, cautioning, however, that a special nurse or doctor be present in court during trial (69a).

After Dr. Brock and two other doctors indicated an inability to make a final decision, Dr. Clark (who had been recommended by Dr. Brock [50a, 106a]) examined the petitioner (76a, 77a, 81a). His report concerning petitioner's "physical fitness to stand trial in the immediate future" (92a), concluded quite inconsistently in the face of the extensive recitation of his general condition in the report, that his state of health did not preclude his going to trial. Petitioner, in his opinion, was not likely to improve and that if any risk existed it "would in time become greater rather than lesser" (95a).

The medical reports submitted below by petitioner were from six physicians who had first-hand experience in the treatment of petitioner, namely, Doctors Dolger, Frieden, Kershner, Levitt, Nott and Myers. They all substantiated the objective medical circumstances hereinabove set forth. Their opinions emphasized the severe risks to which petitioner was exposed and indicated the limitations imposed upon him by reason of his condition as to consultation with counsel, preparation for trial and actual appearance at trial (70a-78a, 82a-83a, 114a).

Thus, to quote relevant portions of their reports, it was reported that "any undue excitement would result in serious damage" (Dolger, 71a); "absolute bed rest" was required or petitioner was likely to "suffer another stroke" (Kershner, 73a); that any "undue emotional stress can be detrimental at this time" (Frieden, 75a); that any "untoward stress or excitement could provoke serious additional damage" (Levitt, 82a); and that "rest at home" was required, it being "hazardous" for petitioner "to travel to New York" (Nott, 21a).

Dr. Myers' report, based upon his examination of petitioner and his medical history, addressed itself specifically to the issue and he rendered the opinion that:

> "[Petitioner's] mental and physical condition makes proper consultation with his counsel in the prepara-

tion of his case extremely difficult and very likely fruitless." (114a)

This opinion by Dr. Myers was reduced to writing four days before the actual commencement of trial and was accepted by the trial judge as if Dr. Myers had testified personally (112a).*

The actual difficulties encountered by counsel in preparation of the case presented to the court orally and in sworn affidavit

Trial counsel for petitioner recited to the court on several occasions his first-hand experiences in attempting to consult with petitioner and prepare the case for trial; and further submitted his sworn affidavit to the court recounting these general difficulties upon the formal motion for an adjournment and a hearing on the issue (See e.g., 9a-19a, 25a-26a, 30a-36a, 42a-43a, 47a-52a, 98a-101a, 102a-107a).

Counsel, among others, stressed the following difficulties: that in view of petitioner's condition he was unable to speak with him and interrogate him as he would normally do in the preparation of a case; that there is a limited time he can spend with petitioner in a day, in view of his condition and "with a degree of safety for him"; that he finds that he is able to talk with him for only 30 minutes at a time, and he gets excited—in short, he finds it "almost impossible" (10a-11a, 17a); that peti-

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* The court below, unfairly, we believe, criticized Dr. Myers' opinion as "conclusory" (A13-14). This is to ignore the fact that he actually examined petitioner and made precise findings; and that his ultimate opinion was hardly more conclusory than Dr. Clark's, upon which the court relied, or Dr. Brock's, for each was dealing with an ultimate fact. Significantly moreover, Dr. Myers, unlike Drs. Clark and Brock, addressed himself to the precise question at issue.

tioner was "unable to properly and fairly assist [him] in the preparation of this case" (25a); that petitioner's "mental and physical condition is such as to render it impossible for him to consult with counsel for any considerable period of time in order to prepare his defense"; that "he is unable to assist counsel because of his physical limitations and his mental condition, in the investigation and development of the facts and circumstances which would make it possible for him to establish his innocence" (42a-43a); that the problems of trial preparation and consultation with petitioner has been "an almost impossible task" (52a); that specifically, petitioner had been unable to travel to counsel's office in Brooklyn during the hot weather; that when he has come, counsel found "that his memory was very poor, that he was unable to stay for any great length of time" (52a); that petitioner has not been able properly to cooperate and has been unable to furnish the necessary information for counsel to prepare the case (52a); that counsel has "not been able to consult with [petitioner] more than a few times"; that as a result of petitioner's condition he was advised by his doctors not to travel to New York; that the stroke affected petitioner's speech in that although the condition is improving he is constrained to "talk with his mouth twisted to the side"; and that, as a general matter, "his stroke has almost barred his participation with [counsel] in the preparation" of the case (105a). Counsel further stressed that particularly in view of the terrific heat at the time, petitioner could not possibly be required to "sit in the courtroom and then be asked to spend several hours a day with me after court to prepare the case" (107a).

The court below erroneously refused to determine the relevant issues bearing on petitioner's mental and physical capacity to stand trial by means of an evidentiary hearing, which was required here, as a matter of constitutional right, and in accordance with this Court's decisions in the *Pate*, *Bishop* and *Dusky* cases.

A bona fide dispute on competency to stand trial and assist counsel, like any other disputed question of fact, can only be resolved by an evidentiary hearing. The decisions of this Court accordingly hold that, absent frivolity, where facts are called to the trial court's attention, indicating that the defendant may be mentally and physically unable to effectively defend against the charge and assist counsel, the Constitution requires a plenary hearing for determination of the issues presented. The matter cannot be resolved upon affidavit or conflicting medical reports without the benefit of live testimony, including expert witnesses, subject to cross-examination.

This we submit is the teaching of the decision by this Court in *Pate* v. *Robinson* (383 U. S. 375 [1966]; See also, *Rees* v. *Peyton*, 384 U. S. 312 [1966]; *Westbrook* v. *Arizona*, 384 U. S. 150 [1966]), as well as *Bishop* v. *U. S.* (350 U. S. 961 [1956]) and the long line of authority comporting with *Bishop* in the analogous habeas corpus context (See e.g., *Walker* v. *Johnston*, 312 U. S. 275 [1947]; *U. S.* v. *Hayman*, 342 U. S. 205 [1952]; *Thomas* v. *Cunningham*, 313 F. 2d 934 [4th Cir., 1962]; *Catalano* v. *U. S.*, 298 F. 2d 616 [2nd Cir., 1962] *Cf. Townsend* v. *Sain*, 372 U. S. 293 [1962]), mandating a hearing on the issues as an absolute matter of right, unless the application therefor is patently frivolous.

It is further submitted, with particular reference to this Court's determination in *Dusky* v. *U. S.* (362 U. S. 402 [1960]), and under the circumstances of the case at bar, that the determination constitutionally required by means

of the evidentiary hearing before trial must embrace affirmative findings that the defendant had sufficient mental and physical ability, as well as adequate opportunity in light of his condition, to consult with counsel in advance of trial and during the trial; and that in light of his over-all condition, including the severe speech impediment under which he labored, he was capable of taking the stand to testify if he so desired.

Instead of conducting a hearing with cross-examination, the District Court relied on a letter from Dr. Clark, and an *ex parte* telephone conversation between Dr. Clark and Judge Herlands (96a, 112a). While it does not appear that reliance was placed thereon by the District Court, the Court of Appeals (A13-14) tended to justify the denial of a hearing also by reference to the report of Dr. Brock.

These doctors, however, never came to grips with the issues requiring determination in advance of trial. The principal orientation of their reports was petitioner's physical fitness, without more, to stand trial. To conclude as Doctors Brock and Clark essentially did that the patient will live through a two-week trial if he were to do nothing but sit "mutely" in court, hardly comports with accepted constitutional notions of proper trial procedures in the federal courts and a defendant's constitutional rights.

In terms of the specific issues requiring determination, neither Doctor Brock nor Clark addressed themselves specifically to whether petitioner was mentally and physically capable, and whether he had *adequate opportunity* in light of the general physical limitations to which he was subjected, to adequately assist counsel in the preparation required in advance of trial. We hardly need emphasize the intensive nature of pre-trial preparation of a criminal case. Doctors Brock and Clark did not even mention the matter of pre-trial preparation—let alone indicate an awareness of the nature of the participation therein required of a criminal defendant.

Nor did these doctors adequately address themselves to the issue of whether petitioner, in light of his many infirmities, could effectively assist in his defense during the actual course of trial, considering the lengthy hours daily to which a defendant on trial is subjected, which extend far beyond the court day and into the night. Their reports hardly reflect an awareness of these circumstances or the fact that under our system of continuous trial days the lawyer and defendant, if he is to assist his lawyer properly, must be able to start a whole new day after the court day is done; that there is hardly a strain known to man more severe than the trial of a criminal case.

The opinions of Doctors Brock and Clark, moreover, are completely barren of comment on the issue of whether petitioner was able to effectively testify in his own behalf during the course of trial in light of his mental and physical condition, generally, and the severe speech impediment under which he was laboring, in particular. On the basis of their reports, they rather blithely presume that a man whose speech is slowed and slurred, constrained to talk with his "mouth twisted to the side", can effectively communicate with a jury—let alone withstand the inevitable rigors of cross-examination in light of his general debilitated condition.

We believe it is apparent, therefore, that the opinions of the court-appointed doctors evidence a total lack of appreciation of the criteria to be utilized in determining whether a defendant is able to stand trial. This points up the absolute necessity of an evidentiary hearing on the issue and the error of the courts below, in contravention of prevailing law as reflected in the decisions of this Court in *Pate, Bishop* and *Dusky, supra,* in denying a hearing to petitioner.

The wisdom of the rule is self-evident, since the test must be a judicial test, not a medical test based upon self-conceived standards of the reporting court-appointed

doctors as to what they believe are the relevant criteria in determining ability of a defendant to stand trial. It is for the court, not the doctor, to determine the ultimate issue of the defendant's capacity to stand trial. The standards used by the doctor are not only obscure but undoubtedly differ from physician to physician. Where serious illness, involving brain damage (to mention but one circumstance) is conceded by all the medical opinions, the doctors must then be oriented toward standards of determining ability to assist counsel and to testify in the defendant's own behalf. Logically, in the absence of specific instructions from the court to the examining physicians, the only method useful for the ultimate judicial determination is that of a hearing with cross-examination. In this way only can the criteria for the opinions used by the medical experts be determined and appropriate resolution of the questions presented be had.

The court below failed to give due weight to this Court's decision in the *Pate* case, *supra*, and improperly limited the scope of due process in such matters by its application of 18 U.S.C. § 4244

With reference to *Pate, supra,* the Court of Appeals emphasized that a state court decision was involved; and held that the determination by this Court therein "did not create any new federal right or a new procedure for applying for a hearing in the federal courts on the issue of mental competency to stand trial;" and that in the federal courts, 18 U.S.C. § 4244, enacted "in aid" of "due process", was the "exclusive procedure" to be followed (A12).

This very question as to definition of the scope of § 4244 and whether it satisfies due process requirements is one of recurring importance in the administration of federal criminal justice and commends itself for review by this Court.

Pate held that the defendant was "constitutionally entitled to a hearing" (383 U. S. at p. 377). No significance can be accorded to the fact that the case came up from a state court. *Townsend* v. *Sain* (372 U. S. 293 [1962]) is significant in this regard. This Court there set forth the circumstances under which a plenary evidentiary hearing was mandatory in the federal habeas corpus review of claims by state prisoners of unconstitutional detention. Chief Justice Warren wrote, in relevant part, that where "the facts are in dispute", the federal court on habeas

> "*must* hold an evidentiary hearing if the habeas applicant did not receive a *full and fair evidentiary hearing* in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trier of fact has after a *full hearing reliably found the relevant facts.*" (372 U. S. at p. 312; emphasis supplied).

If a state court is constitutionally bound to such standards for evidentiary hearings in matters involving claims of constitutional right, we can hardly expect less of a federal tribunal acting as a court of first instance.

Furthermore, while § 4244 may have been envisaged as being "in aid" of "due process" when enacted by Congress, it can hardly serve to define the outer limit of constitutional right; and to the extent that it may circumscribe the right of due process, as in its application to the situation at bar (providing as it does for a hearing only if the *ex parte* report of the court-appointed psychiatrist makes a finding of "incompetency"), it must be regarded as unconstitutional.

The decision below is in conflict with the decisions in the District of Columbia Circuit, which apply procedures consonant with the full requirements of due process in such matters

We submit, moreover, that the full reach of due process is rather more nearly exemplified by the procedure which obtains in the District of Columbia Circuit. The Court of Appeals in that Circuit, applying D. C. Code § 24-301(a), the counterpart of 18 U.S.C. § 4244, holds that if the "accused or the Government objects" to a certification of competency, "a hearing must be held to determine competency" (*Whalem* v. *U. S.*, 346 F. 2d 812, 815 [D. C. Cir.], cert. den. 382 U. S. 862 [1965]; *Wider* v. *U. S.*, 348 F. 2d 358 [D. C. Cir., 1965]; *Canady* v. *U. S.*, 351 F. 2d 817 [D. C. Cir., 1965]; see also, *Kenner* v. *U. S.*, 286 F. 2d 208 [8th Cir., 1950]).

The statutory language of D. C. Code § 24-301(a), like 18 U.S.C. § 4244, provides for a hearing on the issue of competency only in the event a defendant is certified to be incompetent by the court-appointed physicians. D. C. Code § 24-301(b), treating with cases of the restoration to mental competency of one previously certified as incompetent, provides for a hearing in the event "the accused or the Government objects". The District of Columbia Court of Appeals holds, however, that this standard is not limited to restoration cases, but equally applies to a certification of competency in the first instance—notwithstanding the restrictive language of § 24-301(a).

We submit that the foregoing approach which prevails in the District of Columbia is one of due process, as required by *Pate, supra,* rather than of statutory interpretation.

This apparent conflict between the decisions of the Court of Appeals in the District of Columbia Circuit and the standards which there control, and the approach of the Second Circuit Court of Appeals, adds a further dimension to this case, indicating the importance of review by this Court.

The decisional law in the habeas corpus context, exemplified by this Court's decisions in *Bishop* and *Walker, supra,* should equally apply to pre-trial hearings; and to the extent that inconsistencies obtain they should be reconciled by this Court

The standards obtaining in the District of Columbia are not unlike those applied in the habeas corpus context (*Bishop* v. *U. S.* and *Walker* v. *Johnston, supra;* see also cases cited p. 15, *supra*). This Court held in *Walker* v. *Johnston, supra,* that where a prisoner is in custody he must get an evidentiary hearing on a writ of habeas corpus to determine ability to stand trial and competence, unless his claim is frivolous. There should be no distinction between the constitutional requirements in determining a writ of habeas corpus where the defendant is in custody and of determining the very same issue if it arises before trial. Yet, if the decision at bar stands, such an anomalous distinction will obtain in the Second Circuit.*

Significantly, the court below did not state that petitioner's claim as to mental and physical incapacity was frivolous. Such a finding would be impossible in the circumstances at bar. The very conceded facts—consisting of hardly more than the objective medical circumstances pertaining to petitioner's condition, as outlined above (pp. 9-11)—clearly demonstrate a total absence of frivolity.

Furthermore, the inability of the Government doctors to agree in their conclusions with the doctors who were treating petitioner, standing alone, still evidences a difference of opinion which automatically takes the case out of the realm of the frivolous. Moreover, four District Judges

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* Although this Court has not been required specifically to pass upon this point in terms of constitutional doctrine (See *U. S.* v. *Hayman,* 342 U. S. 205, 223 [1952]), we respectfully suggest that a statute more restrictive in scope than 28 U.S.C. § 2255 could hardly pass the test of due process. If § 2255 meets the requirement of constitutional due process, the absence of a similar statutory provision and the refusal of a hearing in our case, do not. A statute is not necessary to vindicate a constitutional right.

thought a hearing might be required. No District Judge made the statement (or assumed) that the claim was "frivolous". Each of them thought that the matter should be determined by the trial judge who then failed to properly pass on the issue.

To the extent that the "frivolous" standard is relevant, as we think it is, the failure of the court below to give it effect provides a substantial basis for review herein. Contrariwise, if the Court of Appeals' failure to apply the standard may be deemed appropriate under the posture of existing law—with the result that separate standards apply for one moving after trial while in custody and one moving before trial—examination of this distinction and its perpetuation is an important question which warrants consideration by this Court.

Separate standards cannot be properly applied for determination of physical and mental competency as it bears upon a defendant's ability to stand trial. Doctrine applicable to determination of applications for continuance, moreover, has no relevance

A further distinction was drawn below, which we submit is also untenable and should not be perpetuated. The issue of ability to stand trial was compartmentalized in terms of mental incapacity (A10) and physical incapacity (A14), with different standards being held applicable to each.

The distinction, we submit, is artificial; and but further points up the necessity for imposing upon the lower courts a general due process approach as indicated in *Pate, supra,* with uniform standards, as promulgated in *Bishop* and *Walker, supra.* These standards must apply equally to mental and physical incapacity insofar as it affects the ability of a defendant to effectively assist counsel before and during trial, and its bearing upon his ability to testify. The physical and mental aspects of the defendant's condition coalesce.

Surely, one who is immobile, and by reason thereof lacks the opportunity to consult with counsel; or who, as a result of a debilitating condition is limited to extremely short periods of consultation, is no less affected than one who cannot communicate fully with counsel because of mental incapacity. Similarly, one who is laboring under a severe speech impediment, which prevents cogent articulation and proper demeanor on the witness stand, is under no less a disability than one who is mentally unable to testify. The constitutional ramifications are the same. In either case, where the claim is not frivolous, a plenary hearing to determine the issue is required.

The constitutional right to a hearing cannot be waived by agreement of counsel to submit a defendant to examination by a court-appointed doctor

The position of the Court of Appeals on waiver (A16), we respectfully submit, is unsupported either in the record or in precedent. Acquiescence by counsel in the selection of a particular doctor to examine the petitioner hardly carries with it blind antecedent consent to the findings and waiver of challenge thereto—let alone deprival of the petitioner's constitutional right to an evidentiary hearing as a matter of due process. But here, moreover, counsel kept asking for a hearing (34a, 35a, 51a, 142a) which is inconsistent with the very concept of a waiver. One is not voluntarily waiving the very thing one is asking for.

In fact, even if counsel had expressly stipulated to waive an evidentiary hearing on competency, or ability to assist counsel, we are told by *Pate* v. *Robinson, supra,* that such a fundamental right cannot be waived (383 U. S. at p. 384).

II

Petitioner was deprived of a fair trial because of the admission in evidence of a copy of the surreptitious tape recording, absent the production in court of the original, which had never been subjected to examination for alteration or tampering and was lost as a result of the gross negligence of the Government in breach of its duty to preserve original evidence.

The crucial evidence in this case upon which the conviction of petitioner stands, was the so-called "Brodsky" tape (Exhibit 48)—being the tape recording of the conversation held on August 25 in Mrs. Fuller's apartment between Knohl, Brodsky and Fuller (152a). This tape was but a copy, never properly authenticated, of an alleged original recording which was never produced and allegedly lost or destroyed as a direct result of the conduct of the Government and its agents. The absent original tape, moreover, was exceedingly suspect in and of itself—in terms of the validity of its composition and manner of recordation. Petitioner never was given an opportunity to examine the original tape for alterations or tampering.

The admission of the Brodsky tape in evidence, we submit, represents an "indiscriminate use" in a federal criminal trial of the fruits of a surreptitious eavesdropping device as to which this Court expressed concern in its recent decision in *Berger* v. *New York, supra* (388 U. S. at p. 56). We most respectfully urge that in the exercise by this Court of the self-imposed burden of "heavier responsibility" as to "supervision of the fairness of procedures" (*Ibid.*) in relation to such devices, the judgment of conviction below must be vacated. The use of the tape recording in evidence at petitioner's trial violated fundamental concepts of due process and raises questions of first impression in connection with the use of tape recordings, which warrant clarification for the guidance of the lower federal courts.

Suspect nature of the tape recording and evidence as to tampering

The Court of Appeals recognized in its opinion that "tape recordings are susceptible to alteration" (A22). The actions of Mrs. Fuller in this regard were highly suspicious. She started with one reel of tape and physically fragmented it (266a-88a). She changed reels around (276a). She cut off a portion of the "Brodsky" tape, because in her view it was "irrelevant", although she never produced the excised part (266a-69a). A portion was "over-taped", thus, deliberately destroying that portion of the original recording (161a, 198a, 280a-81a, 385a-86a). She admitted that she knew how to blot out, erase, overtape, and retape an entire recording—in particular, with the use of two machines which were available to her at all relevant times (198a-200a, 394a-95a).

For some inexplicable reason the two machines failed to pick up conversations until August 24, within approximately two hours after she had been interviewed by the FBI (186a-87a, 195a-96a, 237a-40a, 264a, 273a-74a, 306a). Moreover, she allegedly made no mention of the tape recording; and did not produce it until September 10 (149a, 300a, 310a), although in frequent touch with the Government during the preceding two weeks (145a-46a, 300a, 307a-08a).

The evidence also demonstrates that Mrs. Fuller controlled the quality and audibility of the tapes by subjecting them to background noises at will, such as the air conditioner (277a); or by turning her head and talking in low tones (see 279a); or, obviously, by going into a different room (279a). She could selectively render inaudible that which she did not wish to have preserved (see also 384a-87a, 320a). Furthermore, there were admitted changes of voices in the tape allegedly attributed to petitioner (322a). Obviously, this could have been easily accomplished by maneuvering the tape, overtaping, splicing and dubbing in.

The strange and unusual conduct of the FBI in failing to authenticate the tape produced and in making an adulterated copy

Mrs. Fuller made two appearances with the tape at the FBI—the first being on September 10, and the second approximately one week later (149a, 300a-01a). The sequence of events which followed thereon are truly incredible.

First, as to elementary standards of authenticity, the FBI having the tape in its physical custody upon two separate occasions, did absolutely nothing in order to determine whether the tape was authentic and free from tampering or alteration. Specifically, the original tape produced was never measured (312a, 315a). They did not examine every part of the tape (316a)—at least to ascertain whether any splices were evident. No scientific device was utilized in order to test the tape and determine whether anything had been done with it (317a). The quality of the tapes was not compared (312a). Moreover, sufficient inspection and examination was not even made in order to determine whether an original or a copy had been produced by Mrs. Fuller (317a).

Secondly, with all the technical facilities at its command, the FBI did not even attempt to make a proper copy. Instead, they used a primitive method for copying the tapes. They simply set up two recording machines in a room, played the tape brought by Mrs. Fuller on one, and held the microphone from the second machine against the speaker of the first machine (300a-01a). This was apparently done, moreover, with a fan operating in the background (301a). The result was to superimpose background noise on the tape and increase its general inaudible quality (301a). On the second occasion, when Mrs. Fuller came with the tape, although they could not make a copy for the alleged reason that the equipment did not work (301a, 315a), they again failed to keep the tape. The

FBI, after first adding additional background noises, then proceeded to make a second copy of the tape by running it through a filter for the purpose of allegedly removing background noises (301a, 316a)—but did so without knowing whether any low-pitched voices would thus be removed from the recording (317a).

This third copy was the one ultimately admitted in evidence (302a, 316a). It was secondary evidence which could in no way measure up to the original in that (a) it was adulterated by means of the copying process; and (b) because the extent of the admitted tampering by the maker could no longer be determined by physical and scientific examination of the tape.

Loss of the original tape by reason of the negligent and reckless conduct of the FBI

The situation involving the "Brodsky" tape was made even more serious, by the loss of the original tape as a result of the gross negligence of the Government. When Mrs. Fuller came to the offices of the FBI, the Government could have obviously arranged to retain the original, which she produced, whether by agreement or through the use of process. It did not use process for some unexplained reason; and instead of keeping the original and returning the copy to the witness, it did the opposite (189a-93a, 286a, 289a, 301a, 314a).

Then, after improperly letting the witness keep the original tape, the Government failed to take adequate measures to ensure its preservation and production at the time of trial. An arrangement was made between Mrs. Fuller and the FBI that the original tape would be deposited in a safety deposit vault (191a-93a, 205a, 289a, 314a). Mrs. Fuller was not to be allowed to remove the tape from the safety deposit vault unless the bank notified the FBI and the removal was done with FBI permission (314a); and she was supposed to confer with FBI Agent Goss before

taking the tape out (324a). The arrangement, according to Goss, was to be one of "dual control" (314a).

Instead of effectuating this "dual control", Goss testified that the FBI did not actually go to the bank with Mrs. Fuller (314a)—although she curiously claimed to have been "taken with the FBI" (Goss) to the strongbox for deposit of the tape (192a). There is no evidence, moreover, that the FBI even communicated with the bank to ensure the arrangement. They did not even check whether the tape was put into the vault in the first place. They did not arrange for a duplicate key (323a-24a). In fact, Mrs. Fuller testified that the FBI rented the box and gave her the 2 keys (205a). Although Goss testified the FBI did not go to the bank (324a), his only excuse was that Mrs. Fuller was supposed to confer with him before taking anything out of the vault (324a).

We maintain that this was nothing more than an invitation to the Government witness, Mrs. Fuller, to lose the original tape. And "lose" it she did.

She removed it from the bank—why no one knows—and put the tape in a drawer in her apartment (289a). When she took it out to bring to her attorney's office for turning over to the FBI, although no one had had access to it but Mrs. Fuller and the FBI, it was blank (192a-93a, 204a, 286a, 289a, 316a). This is the equivalent of deliberate destruction of the original tape.

The breach by the government of its duty to preserve original evidence and the resulting denial to petitioner of the opportunity to examine and inspect the original tape, constituted a deprivation of constitutional right

In *U. S.* v. *Consolidated Laundries* (291 F. 2d 563 [2nd Cir., 1961]), the Second Circuit announced the rule, of constitutional import, which it failed to apply in the case at bar, that the Government has an "absolute duty" to

"keep the evidence of which it was custodian in such manner that it would be available for use upon the trial by all parties." (291 F. 2d at p. 570; accord: *U. S.* v. *Heath*, 147 F. Supp. 877 [D. Hawaii, 1957], aff'd 260 F. 2d 623 [9th Cir., 1958]; see also *Sylvania Electric Products, Inc.* v. *Flanagan*, 352 F. 2d 1005, 1008 [1st Cir., 1965]; *People* v. *King*, 225 P. 2d 950, 101 Cal. App. 2d 500 [1950]). The Government's duty is breached if the original evidence in its possession or control is lost or destroyed, whether by reason of its negligence or deliberate act. (See e.g. *U. S.* v. *Consolidated Laundries Corp., supra; U. S.* v. *Heath, supra*, 147 F. Supp, at pp. 878-9; *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842, 846 [4th Cir., 1964]; *Thomas* v. *U. S.*, 343 F. 2d 49, 53 [9th Cir., 1965]).

The conduct of the FBI in the case at bar constituted a reckless disregard and breach by the Government of this duty to preserve original evidence. The prejudice resulting to petitioner was real. As a result of the Government's failure to preserve the original tape recording, he was precluded from determining whether there was tampering and obliteration of the tape, which could only be done upon physical possession and access to the original in court.

When dealing with an instrumentality so highly susceptible to tampering as a tape recording, and where evidence of the tampering is unlikely to be preserved upon a copy, the denial to a defendant of the opportunity to examine the original is a denial of his right to a fair trial and due process of law.

Significantly, the Court of Appeals conceded that the "Government's procedures for insuring the safekeeping of the tape were hardly adequate" (A24). We assume that "hardly adequate" is a euphemism for "inadequate"; and the safekeeping by the FBI could not be inadequate unless the Government was under some duty. The failure of the Government in its duty adequately to preserve the

tape, is essentially the same as the breach of duty which obtained in *Consolidated Laundries* and *Heath, supra.*

The holding of the Court of Appeals that the Government could not compel Mrs. Fuller to surrender the tapes (A24), cannot go unchallenged. In the first place, she could as well have kept a copy and given the Government the original. The relationships between Government officials and Government witnesses, especially when the Government's witness is in peril of being prosecuted for crime herself, is one that requires the closest scrutiny by appellate courts. We respectfully suggest that it is a dangerous precedent to tell prosecutors, as the court below did, that they have no duty to use court process to preserve evidence that may be helpful to a defendant. The process is readily available and should be used, and this should be made the rule in federal prosecutions.

The decision of the Court of Appeals constitutes a revival of the discredited "silver platter doctrine", effectuated in the guise of the best evidence rule

The Court below failed to acknowledge the constitutional implications of the issue presented, viewing the matter instead as a best evidence question (A22, 24). The proposition which we urge, although it transcends the best evidence rule, is somewhat analogous. Thus, it is generally stated that in order to lay a foundation for the introduction of secondary evidence, it must be first established that the original was lost or became unavailable *"otherwise than through the fault of the proponent of the testimony"* (*Sylvania Electric Products, Inc.* v. *Flanagan, supra,* 352 F. 2d at p. 1008; emphasis supplied). So, too, as it is reasoned in the context of the best evidence rule, production is required in order that the party might "examine the * * * original" (*Toho Bussan Kaisha Ltd.* v. *American Pres. Lines, Ltd.,* 265 F. 2d 418, 423 [2d Cir., 1959]). It is only by such physical examination and inspection that one can learn

"legitimate objections" to its "significance" (*U. S.* v. *Alexander,* 326 F. 2d 736, 742 [4th Cir., 1964]).*

The Court of Appeals acknowledged that Mrs. Fuller "was at fault in the loss of the original" (A24). Yet, the mysterious and unexplained disappearance of the tape as a result of Mrs. Fuller's "fault", with all its untoward ramifications, was excused by the Court on the ground that the Government and not Mrs. Fuller "was the proponent" (*Ibid.*).

What the Court of Appeals has actually done is to revive the totally discredited "silver platter" doctrine. Can it still be held that the taint which attaches to evidence unconstitutionally seized and handed over by a state official in a federal criminal prosecution is exorcised by viewing the federal government and not the state officers as the proponent of the evidence? But in any event, the untenability of the labeling process indulged by the court below is clearly pointed up by its recognition that "the Government's procedures for insuring the safekeeping of the tape were hardly adequate" (A24). Thus, even under the narrow view adopted by the court, the one occupying the technical status of the "proponent" was not free from taint or fault in connection with the disappearance of the original.

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* The Court of Appeals in its opinion relied on *U. S.* v. *Manton* (107 F. 2d 834, 835 [1939]), which involved recordacks of checks kept in the regular course of business by a bank. Reliance upon the holding therein, is hardly authority for the modern problem of the use in evidence of a tape recording so highly susceptible of alteration.

The decision below is the first case permitting the use of a copy of a tape recording, absent a concession, where the original is not in court. It creates a new rule of general application relating to the use of eavesdropping devices which deserves the attention of this Court

The decision below in sanctioning the admission in evidence of the Brodsky tape, also goes beyond the practice in such matters by other Circuit Courts of Appeal. As indicated by the only reported cases, decided by the Fourth, Fifth, Seventh and District of Columbia Circuits, the use of a copy of an original tape recording has been permitted only where (1) the original was produced in court, or (2) its authenticity was conceded by the defense (*Johns* v. *U. S.*, 323 F. 2d 421, n. 2 [5th Cir. 1963]; *U. S.* v. *Madda*, 345 F. 2d 400, 402-3 [7th Cir., 1965]; *U. S.* v. *Hall*, 342 F. 2d 849, 852 [4th Cir., 1965]; *Monroe* v. *U. S.*, 234 F. 2d 49, 56 [D. C. Cir., 1956]; Annotation, 58 ALR 2d 1024, 1044).

Neither of these prerequisites were satisfied in the case at bar. Thus, the Court of Appeals for the Second Circuit has now gone beyond existing doctrine in the other Circuits. Significantly, in the only case on the point cited in the court's opinion (A22), *Johns* v. *U. S.*, *supra*, the copy was *conceded by counsel* to be an "accurate re-recording of the wire." The original was also actually in court (See 323 F. 2d at p. 421 n. 2).

As we advance into the field of recording and electronic transcription, sharp tools are being put into the hands of the unscrupulous. A frame-up based on doctored "scientific" recording is loathsome to the administration of justice. The safeguards lie not in the jury's ability to speculate, but in the insistence upon minimal safeguards of authenticity as preliminary to admissibility.

We accordingly request that this Court in the exercise of its self-imposed responsibility to supervise, "the fairness of procedures" in connection with the use of eavesdropping devices should impose standards for admis-

sibility embracing the following: (1). The Government should be required to produce the original in court. (2). If the original is unavailable and secondary evidence is profferred instead, the Government should be required to demonstrate that it was without fault in the loss or destruction of the original; and that it subjected the original to proper and careful physical examination, thereby insuring that it is free of taint. Such examination should consist, at a bare minimum of (a) measurement of the tape to see that nothing has been cut off; (b) examination for splicing; and (c) examination for overtaping and the extinguishment of underlying conversation.

The Court of Appeals, in reliance upon the testimony of Mrs. Fuller, Brodsky and Goss, assumed that there was "very substantial evidence" supporting the authenticity of the copy of the lost tape recording (A. 23). The reason a tape recording is permitted in evidence at a trial—with its "persuasive, sometimes a dramatic, impact on a jury" (A. 22)— is because it purports to be an absolutely accurate transcription of a conversation. To say, therefore, that the tape may be authenticated on the basis of witnesses' general recollection alone is an inconsistency in itself—amounting to no more than lifting one by his own boot straps.

The emphasis of the court on the fact that only matters elicited by the defense which reflected upon authenticity resulted from cross-examination (A23) is to miscast the burden. The burden is upon the Government to prove authenticity by producing the original in court; and it is not for defendant to disprove authenticity in the absence of the original without ever having had physical access thereto. Without the original tape being in the courtroom, scientific measurement and analysis to determine alteration was actually impossible. If the decision below stands, there is literally no safeguard for a defendant against tampering with an original tape recording that is never produced.

III

The secret tape recordings were subject to discovery by petitioner, as a matter of right. The Government had an affirmative duty to disclose their existence in advance of trial.

Defendant moved before trial for an extensive bill of particulars and discovery and inspection pursuant to Rules 7(f) and 16 (20a-29a). On the motion, petitioner did not directly request production of the tape recordings, or any statements made by him in the possession of the Government. He knew that he had made no statement voluntarily; and he did not know of the secret recordings made by Mrs. Fuller without his knowledge.

This Court in promulgating the revisions of the Federal Rules of Criminal Procedure, ordered, in relevant part, that they "shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced and so far as just and practicable *all proceedings then pending*" (383 U. S. 1089; emphasis supplied).

We maintain, under the new Rule 16(a), that (1) the Government had an affirmative duty to come forward and produce the tapes before trial for discovery by petitioner; and that (2) petitioner's right to such discovery was not discretionary with the trial court. The Court below ruled to the contrary on both of these points (A24-26), which are important matters of general application in the administration of the new Rule 16(a).

Imposition of a duty upon the Government to come forward in advance of trial and disclose its possession of surreptitiously made recordings of a defendant's statements, is consistent with the provisions of new Rule 16(a)*, as well as the current trend towards full disclosure.

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* The Rule contemplates that a defendant may not be able to specifically request a statement procured by means of a surreptitious tape recording. Thus, the reviser's comments on Rule 16(a) state, in relevant part, that "The defendant is not required to designate, because he may not always be aware that his statements or confessions are being recorded."

evidenced by the decisions of this Court (See e.g., *Dennis* v. *U. S.*, 384 U. S. 855, 870 [1966]). Even before the advent of the new Rule 16(a) the discovery of statements by a defendant was regarded by this Court to be "the better practice". (*Cicenia* v. *La Gay*, 357 U. S. 504, 511 [1958]) The decision in *U. S.* v. *Nolte* (39 F.R.D. 359 [D.C.N.D. Cal., 1965]), holding that tape recordings of conversations in the possession of the Government are subject to pre-trial discovery was cited with approval in the *Dennis* case, *supra* (384 U S. at p. 871, n. 17).

The citation by the Court of Appeals of *U. S.* v. *Murray*, 297 F. 2d 812, 820 (2nd Cir.) *cert. denied* 369 U. S. 828 (1962) and *Shores* v. *U. S.*, 174 F. 2d 838, 843 (8th Cir. 1949), holding to the contrary, reflects an undaunted adherence by it to discredited doctrine.

The Court of Appeals reasoned that petitioner was not prejudiced by the failure of the Government to come forward in advance of trial with the tape recordings, since counsel was afforded two or three days during the course of trial (over a non-business weekend) in order to listen to the tapes after their surprise identification on the first day of trial (A26). Such reasoning, if sustained, is to defeat the entire concept of pre-trial disclosure, which imports adequate opportunity to prepare in advance of trial.

The advent of the new Rule 16(a) on July 1, 1966, nine days after the Government submitted to pre-trial disclosure (its bill of particulars being served on June 23) cannot excuse the failure of the Government to come forward. It would have been a futile gesture for petitioner to make a further motion after July 1 (A25-26) as the Court of Appeals suggested in its opinion. Petitioner did not know of the existence of the tapes until the actual commencement of trial five days later on July 6.

The further holding of the Court of Appeals that the matter of discovery of the tapes was discretionary under the new rule (A25), hardly comports with its purpose, the

intention of the revisers (see 39 F.R.D. 175, 176) or with the implications of the *Dennis* case, *supra*, as well. To leave the matter to the discretion of a District Judge sitting in a criminal motion part is to permit the predeliction of the particular Judge on such matters to control whether relief is granted or not. No guide lines are given for the exercise of the so-called "discretion" and there is normally little information available to the District Judge in the pre-trial procedure. To construe the rule as discretionary is to make for non-uniformity in its application—an undesirable result. We submit that the new Rule 16(a) was intended to give a defendant discovery of his own recorded statements as a matter of right.

IV

Petitioner's surreptitiously taken statements were subject to Fourth and Fifth Amendment protection.

In addition to the Brodsky tape of the conversation of August 25, 1965, Mrs. Fuller continued surreptitiously to record conversations with petitioner, particularly during the latter part of September through November 1965, which were also admitted in evidence (Exhibits 54, 57 and 65; 154a-57a).

We maintain that there was sufficient in this record to show that at the time these recordings were made (September through November and subsequent to the "Brodsky" tape), Mrs. Fuller was acting as an agent of the Government, Knohl was the target of investigation, and the Government already had sufficient evidence for a conviction.

On September 3 and 9, Mrs. Fuller was interviewed by the FBI. On September 10 and 17 she appeared at the FBI office with the Brodsky tape. Mrs. Fuller at one point did not remember whether she told Goss that she was going to continue to tape conversations she "would have with Mr.

Knohl" (205a). At another point, she in fact stated that she "might have" told the FBI that she was continuing to tape conversations (285a). In any event, she did continue to make recordings into the months of October and November.

Superimposed upon the foregoing is the testimony of Mrs. Fuller as to her dealings with the FBI. "Since the FBI came to me at the Bankers Trust" (on August 24), she testified, "I kept giving Mr. Armstrong all the papers" (175a). On the Brodsky tape she dubbed in the remark, by overtaping, that she was deliberately making the recording for the express purpose of turning it over to the FBI—allegedly to demonstrate her innocence but admittedly to inculpate Knohl (161a, 284a).*

The recent decision by this Court in *Berger* v. *New York, supra,* indicates that conversations of individuals, even if not made within the confines of their home or office, are now subject to Fourth Amendment protection, requiring that a search warrant, particularizing the conversation sought to be surreptitiously overheard, be obtained. We believe that the necessity for a search warrant as a condition precedent to the eavesdropping (September to November) was particularly indicated in the case at bar where petitioner was the undisputed target of an investigation and the Government already had in its possession sufficient evidence to indict and convict. Before the tapes

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* The evidence would in fact indicate that Mrs. Fuller was acting as a Government agent at an earlier stage. Thus, on August 17 or 18, she was approached by the Secret Service and immediately hired a lawyer (141a, 248a-52a, 259a-60a, 297a-98a). On August 24, the FBI interviewed her at the bank (140a, 258a-59a, 300a) and immediately thereafter a tape recording was made. On August 25, she was served with a Grand Jury subpoena (143a) and a second tape was made. On August 26, she spent the entire day being interviewed at the Courthouse and upon her return another conversation was taped (145a-46a, 193a-94a). An FBI agent also visited her apartment on that day (185a, 206a). On August 27, she testified before the Grand Jury and recording continued thereafter.

in question were made, the FBI already had the "Brodsky" tape on September 10, and Mrs. Fuller had already testified before the Grand Jury ("telling the truth" [146a]) on August 27, after extensive interview by the Government on August 26. We, therefore, submit that the eavesdropping was in violation of the Fourth Amendment.

We believe that the extraction of incriminating statements from petitioner, in light of the foregoing circumstances, by means of guile (Cf *Gouled* v. *U. S.*, 255 U. S. 298 [1921]), was also a violation of his Fifth Amendment rights.

We accordingly maintain that, at the very least, the issue of whether the surreptitious tape recordings, or any of them, had been made by Mrs. Fuller while she was acting on behalf of the Government, should have been presented to the jury for determination.

Petitioner, in fact, requested a charge (Request to Charge No. 10), as follows:

> "10. If you find that Mrs. Fuller was acting in such capacity (as an agent, employee or on behalf of the Government), then any alleged admissions claimed to have been procured by her or made to her by Knohl after her statement to the FBI and the United States Attorney on August 26, 1965, must be disregarded and may not be considered by you."

The court refused the proposed instruction (402a). We submit that this was error; that a determination by the jury of the issue was constitutionally required in effectuation of petitioner's rights under the Fourth and Fifth Amendments.

CONCLUSION

Under all the circumstances hereinabove set forth, it is respectfully prayed that the writ of certiorari should be granted.

Respectfully submitted,

GOLDSTEIN, JUDD & GURFEIN,
Attorneys for Petitioner.

MURRAY I. GURFEIN,
JACOB W. HELLER,
Of Counsel.

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 340—September Term, 1966.

(Argued February 21, 1967 Decided June 22, 1967.)

Docket No. 30879

UNITED STATES OF AMERICA,

Appellee,

—v.—

LARRY KNOHL,

Appellant.

Before:

FRIENDLY, ANDERSON and FEINBERG,

Circuit Judges.

Appeal from judgment of conviction, after jury verdict of guilty, for obstructing justice in violation of 18 U.S.C. § 1503, in the United States District Court for the Southern District of New York, Thomas F. Murphy, Judge. Affirmed.

MURRAY I. GURFEIN, Esq., New York, N. Y. (Goldstein, Judd & Gurfein and Jacob W. Heller, Esq., of New York, N. Y., on the brief), for Appellant.

Appendix A—Opinion of the United States Court of Appeals.

DAVID M. DORSEN, Asst. U. S. Atty., Southern District of New York (Robert M. Morgenthau, U. S. Attorney, and Michael F. Armstrong and Frederick F. Greenman, Jr., Asst. U. S. Attys., Southern District of New York, on the brief), for Appellee.

ANDERSON, Circuit Judge:

On April 27, 1966 the appellant, Larry Knohl, was indicted on a charge that on or about August 25, 1965 he "unlawfully, wilfully, knowingly and corruptly endeavored to influence Kay B. Fuller, a witness under subpoena to appear before a Grand Jury . . ." in violation of 18 U.S.C. § 1503.[1] The trial commenced on July 6, 1966. On July 18, 1966 the jury found him guilty, and on September 14, 1966 the court sentenced him to five years imprisonment.

There was evidence from which the jury could have found the following facts. Appellant and Mrs. Fuller had been business acquaintances for about twenty years. During most of that period she was employed as a confidential secretary by one Josiah Kirby of Cleveland, Ohio, who died in 1959 and who in his lifetime had had some business dealings with the appellant. In early August of 1965, the appellant told Mrs. Fuller that he had some $100,000 United States Treasury six month bearer bills and requested her to borrow some money against them or otherwise convert them to cash for him. He offered her $40,000 for doing so.

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[1] 18 U.S.C. § 1503 provides:
"Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness . . . before . . . any grand or petit juror . . . in or of any court of the United States . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both."

He explained that, although the bills had been given to him in payment of a loan, he could neither keep them nor cash them himself, because there was a federal tax lien outstanding against him. Mrs. Fuller agreed to accede to his request, and he suggested that she explain her possession of the bills to the bank, through which the transaction would take place, by saying that they had been given to her by Kirby. Mrs. Fuller, however, was not anxious to name Kirby as her benefactor, because Kirby had been dead about two years and only six months bills were involved. Appellant then suggested that Mrs. Fuller use the name of somebody else who had recently died. She suggested one Cyril O'Neil of Cleveland, formerly a client of Kirby's and it was agreed between them that she use O'Neil's name.

On August 6th, accompanied by the appellant, Mrs. Fuller went to a branch of the Chemical Bank in New York City, where she succeeded in borrowing $95,000 by putting up one of the bills as security. The Bank credited part of the money to a checking account which Mrs. Fuller maintained there, and paid her the balance with a $25,000 cashier's check and $30,000 in cash. Mrs. Fuller immediately gave both the cashier's check and the cash to the appellant and eventually transferred the remaining $55,000 to him by drawing checks on her account.

On August 9th, the transaction was substantially repeated at the same bank with another $100,000 Treasury bill, and Mrs. Fuller again gradually transferred the proceeds to the appellant.

On August 12 and 13, Mrs. Fuller converted four more $100,000 Treasury bills into cash for the appellant at Barclay's Bank in New York City, which sold the bills and credited the proceeds to an account which she maintained there. She subsequently drew checks on this account, through which she transferred almost all of the amount received to the appellant.

On August 18, when she returned to the Chemical Bank to get a $10,000 cashier's check, payable to Knohl and chargeable to the balance still remaining in her account, Mrs. Fuller was questioned by Secret Service agents about the source of her Treasury bills. When Mrs. Fuller returned to Barclay's Bank on August 24th to draw out another $10,000 for the appellant, she was met by F.B.I. Agent Goss, who told her that the Treasury bills had been stolen from the Bankers Trust Company in New York City, and he questioned her at some length. Later that day she returned to her apartment. Knohl joined her there and she told him what Agent Goss had said about the illicit source of the bills. Knohl denied that they had been stolen and said to Mrs. Fuller, "Stick to your story, the O'Neil story . . ., because a dead man can tell no tales." Both following this instance and the prior occasion when she had been questioned by the Secret Service Agent on August 18th, Mrs. Fuller contacted her attorney, Abraham Brodsky, for advice.

On August 25th, Mrs. Fuller was served with a subpoena to appear before a Grand Jury of the United States District Court for the Southern District of New York on the morning of August 26th. She immediately got word to the appellant, who later came to her apartment. Concerning the subpoena he said, "Don't worry about it. You stick to the O'Neil story and nothing will happen." Mrs. Fuller again telephoned and later visited Attorney Brodsky, who eventually joined her and the appellant at her apartment to discuss the matter of her testifying before the Grand Jury. In the presence of Attorney Brodsky, appellant again urged Mrs. Fuller to stick to the story that she had received the Treasury bills from Cyril O'Neil, but the attorney advised her to "tell the truth."

Mrs. Fuller did not testify before the Grand Jury until August 27, 1965; on August 26 she voluntarily submitted

to a full interrogation about the case by an assistant United States attorney. After she returned home on August 26, the appellant again came to her apartment and urged Mrs. Fuller in testifying before the Grand Jury to adhere to the story that O'Neil was the source of the Treasury bills and otherwise to invoke her Fifth Amendment privilege against self-incrimination. Mrs. Fuller, however, answered all questions directed to her before the Grand Jury. The appellant was not indicted by that Grand Jury but by another one on April 27, 1966.

The appellant presents several grounds for appeal. He asserts that in violation of his federal constitutional rights he was denied a hearing on his claim that he was physically and mentally incompetent to stand trial, that certain evidence was improperly admitted, that the Government failed to fulfill its duty, in the course of discovery before trial, to disclose and turn over to him certain tape recordings containing statements by him and that the Government failed to offer proof by a least two witnesses that the statement which was the basis of the obstruction of justice charge was false. We hold that these claims are not substantiated and therefore affirm.

About November 15, 1965, the appellant had suffered a cerebral stroke, which partially disabled him, and it is on this circumstance and its consequences that he bases his claim on appeal that he was physically and mentally incapacitated to stand trial on July 6, 1966. The appellant was first examined by a court-appointed physician on March 5, 1966, in connection with the trial of a pending charge, unrelated to the present case, in the United States District Court for the Eastern District of New York. The physician was Dr. Samuel Brock, an internist, who reported to the court on March 15, 1966 that Knohl was unable to withstand the rigors of a trial estimated to last several months which he would be required to attend frequently, but the doctor suggested a re-examination in six months.

According to Dr. Brock's report, appellant's primary symptoms were paralysis of the right side of his body, which caused him difficulty in eating and speaking, and emotional excitability. The appellant was able to take a few steps with the aid of a cane but otherwise was confined to the use of a wheelchair. Dr. Brock also reported that the appellant suffered from long-standing hypertension and diabetes, but that the appellant was "well-oriented, alert and responsive, and his behavior for the most part is normal (except for the occasional over emotional episode)" and "gave no evidence of reduction in his ordinary intellectual capacities."

On May 9, 1966, with consent of appellant's trial counsel and counsel for the Government, appellant was ordered by Judge Frankel of the Southern District of New York to undergo a re-examination by Dr. Brock to determine whether he was able to stand trial under the present indictment. The examination took place the same day. Dr. Brock found no new symptoms present, except that appellant claimed more pain in his right hand and shoulder; his diagnosis remained the same. He concluded, however, that there were signs of exaggeration by the appellant, because the claimed diminution of sensation did not fit the normal pattern of the disease, and that these exaggerations bore on the question of appellant's ability to stand trial. Dr. Brock was of the opinion that the appellant would be able to go through a trial lasting approximately two weeks, but suggested that a nurse or doctor be present.

After this report had been presented to Judge Frankel on May 11, 1966, the Government pressed for assignment of the case for trial in June, claiming that it would take only two weeks to try and that an early assignment was urgent because Knohl was threatening to kill Mrs. Fuller. Counsel for Knohl, however, sought a postponement of the trial until September and made reference to letters from

Dr. Dolger, a specialist in diabetes, and Dr. Frieden, a therapist, who said that the trial would be hazardous to the appellant's health. On June 1, 1966 Judge Frankel referred the case to Judge Croake for trial and also left for Judge Croake's determination defense counsel's request for adjournment based upon his claim that he had not finished his preparation for trial and that the defendant Knohl was physically unable to stand trial. On June 13, 1966 at a conference with Judge Croake, counsel for the Government and counsel for the defendant agreed upon a joint examination of Knohl by Drs. Brock, Dolger and Frieden. Drs. Dolger and Frieden were of the opinion that the stress and strain of a trial would be hazardous to the accused;[2] Dr. Brock concluded that Knohl was able to testify but thought that the question of Knohl's ability to testify without dangerous consequences should be passed upon by an internist who was an expert in cardio-vascular disease and hypertension. The other two doctors agreed with this suggestion and the three so reported to Judge Croake who appointed Dr. Eugene Clark, a cardiologist. Up to this time none of the medical opinions of appellant's own personal doctors said anything about his mental or physical capacity to assist counsel in his defense but dealt only with the risk of another stroke or other serious consequences to the accused.

On June 29, 1966 Dr. Clark's report was submitted to Judge Herlands, to whom the case had meanwhile been assigned. Dr. Clark concluded that Knohl's state of health did not preclude his standing trial if the proceedings commenced shortly thereafter and lasted no more than a week or two.

> "Concerning Mr. Knohl's physical fitness to stand trial in the immediate future, which I understand may re-

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[2] Letters from a Dr. Kershner and two others of Knohl's personal physicians were also filed in which they generally expressed agreement with the opinions of Drs. Dolger and Frieden.

quire his presence in court for at least a week or two, it is my opinion that his state of health does not preclude this.

I would agree that Mr. Knohl's appearance in court does involve some risks, but I don't believe that the risk is extreme, and I am reasonably certain that the risk will be none the less a few months from now or at any other subsequent time."

Dr. Clark's determination that the risks from the emotional stress of a trial might be greater, rather than less, if there were a delay, was based on the prognosis that appellant's cardiac status was likely to worsen, that his hypertension could not be expected to improve and that no further improvements in the neurologic defects caused by appellant's stroke were to be anticipated.

At about the same time, the appellant formally moved for an adjournment of the trial until September, and argument was had before Judge Herlands on June 30. The application was made on the grounds that counsel for appellant had not had sufficient time to prepare for trial, that appellant's illness was such that a trial might result in his death, and, in addition, his condition made it impossible for him to consult with counsel in preparation of his defense, and that appellant's counsel was himself unable to conduct a trial in the summer for reasons of his own health and would be forced to resign if no adjournment were granted. Appellant also requested that an evidentiary hearing be held so that a judicial determination could be made about his physical and mental condition.

On June 30, Judge Herlands filed a memorandum of decision denying an adjournment and setting July 5 as the date for trial. His decision was based primarily on the report of Dr. Clark. On the subject of a hearing, Judge Herlands noted that it was within the discretion of the

judge who was to try the case to decide whether or not further medical testimony should be heard on the physical and mental capability of the accused to stand trial and assist in his own defense.

The case was assigned to Judge Murphy and on July 5 counsel for appellant renewed his application to adjourn the case until September, basing it upon the same grounds as those presented to Judge Herlands. Judge Murphy heard the parties at length. Defense counsel filed a letter from a Dr. Myers reporting a recent physical examination of the accused from which he concluded that putting Knohl on trial would endanger his life and that his mental and physical conditions would make "difficult, and very likely pointless, proper consultation with his counsel." Judge Murphy agreed to treat the letter as if Dr. Myers had been present and had so testified. The request for a continuance was denied and the case was set for trial on the following morning. Appellant's counsel, however, said that he would renew the matter at noon recess on July 6 when he would try to have the doctor testify. This was not objected to by the Government nor did the court say that it would not hear him, but on July 6th, the defense did not renew the request or offer the doctor as a witness. The trial began on July 6, and continued (except for July 8, 9, 10, 12, 15, 16 and 17 when the trial was recessed) until July 18, when the jury brought in the verdict of guilty—a total of 6 trial days.

The appellant claims on appeal that the medical reports in the record demonstrate that he "was neither mentally nor physically able to stand trial and assist counsel in his own defense," and that the trial judge should have held an evidentiary hearing.

The Government, on the other hand, in addition to denying the assertion that the appellant was not competent to stand trial, contends that the procedures for determining capacity to stand trial are those enumerated in 18 U. S. C.

§4244[3] and that, since the reports of neither of the two court-appointed physicians, Drs. Brock and Clark, "indicated" incompetence, no hearing was required.

It is well settled that a defendant, who has been convicted while he is incompetent to stand trial, has been deprived of due process. See, e.g., *Bishop* v. *United States*, 350 U. S. 961, vacating and remanding 223 F. 2d 582 (D. C. Cir. 1955) (mental incompetency); *United States ex rel. Rizzi* v. *Follette*, 367 F. 2d 559 (2 Cir. 1966) (mental incompetency); *Clark* v. *Beto*, 359 F. 2d 554 (5 Cir. 1966) (mental incompetency; adopts dicta of *Sanders* v. *Allen*, *infra*); *Rollerson* v. *United States*, 343 F. 2d 269 (1964) (mental incompetency); *Sanders* v. *Allen*, 100 F. 2d 717, 720 (D. C. Cir. 1938) (mental incompetency and dicta re physical incompetency).

In general the granting or denying of a petition for a continuance on the ground that the accused is incompetent

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[3] 18 U.S.C. § 4244 provides:

"Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so *mentally* incompetent as to be unable to understand the proceedings against him *or properly to assist in his own defense*, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. . . . If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court *shall hold a hearing, upon due notice, at* which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. . . ."

to stand trial lies in the sound discretion of the trial judge.[4] See *United States* v. *Armone*, 363 F. 2d 385, 402 (2 Cir.), *cert. denied* 385 U. S. 957 (1966), *United States* v. *Shotwell Mfg. Co.*, 287 F. 2d 667, 672 (7 Cir. 1961), aff'd on other grounds 371 U. S. 341 (1963); *Stein* v. *United States*, 263 F. 2d 579 (9 Cir. 1959); *United States* v. *Alker*, 260 F. 2d 135 (3 Cir. 1958), *cert. denied* 359 U. S. 906 (1959); *Wellman* v. *United States*, 227 F. 2d 757, 775-776 (6 Cir. 1955), vacated on other grounds, 354 U. S. 931 (1957).

The trial court concluded in the present case, on the basis of written reports of physicians and Knohl's own appearance before the court but without a hearing at which oral testimony could be presented, that Knohl was not so physically or mentally disabled that he was rendered incompetent to stand trial. The question before us is, therefore, whether under the circumstances the trial judge erred in requiring the accused to stand trial without first having held a hearing on his competency.

When a defendant asserts mental incompetency between the time of his arrest and the time when he is sentenced, his petition for continuance comes within the provisions of §4244 of Title 18 U. S. C.

The appellant did not in this case petition the trial court during that period before sentencing pursuant to §4244 because he asserts that he was invoking an overriding due process right enunciated by the Supreme Court in *Pate* v. *Robinson*, 383 U. S. 375 (1966) which he claims cannot be frustrated by requiring him to follow §4244. The

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[4] In applying this section an accused is considered to have sufficient mental capacity to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . has a rational as well as a factual understanding of the proceedings against him." *Dusky* v. *United States*, 362 U. S. 402 (1960).

Pate case was concerned with the failure of the courts of the State of Illinois to provide the petitioner with a fair trial, which they could have given him by carrying out the terms of the State's own statute which required "a sanity hearing where the evidence raised a bona fide doubt" as to a defendant's competence to stand trial. The case did not create any new federal right or a new procedure for applying for a hearing in the federal courts on the issue of mental competency to stand trial. Moreover, §4244 was not enacted in contravention of due process but in aid of it.

Where the motion is made as in the present case just prior to the trial, §4244 is the exclusive procedure prescribed for the purpose. Unlike §4245 which applies to a prisoner after conviction and incarceration, §4244 may be invoked by the accused or by anyone on his behalf, and a duty rests upon both the prosecution and the court to comply with it, once it has come to their attention that there is reasonable ground to believe that the accused is mentally incompetent to the degree described in the statute. It does not depend upon action by an administrative board or other official before the petitioner can even be heard in court, as is the case with §4244. *United States* v. *Cannon*, 310 F. 2d 841 (2 Cir. 1962). To hold that §4244 is the appropriate and exclusive procedure to be followed in cases of this kind, however, does not mean that one, who for some reason has been arbitrarily or otherwise erroneously prevented from invoking, or who is unable to invoke §4244 during the period in which it applies or whose evidence of mental incompetency is not discovered until after he has been convicted and sentenced, cannot attack the sentence collaterally. *United States* v. *Brown*, 335 F. 2d 170, 173 (2 Cir. 1964). *Pate* v. *Robinson, supra*, makes clear, that such collateral attack may be made.

In the present case the parties, with the apparent approval of the trial court, stipulated or agreed upon certain

procedures which were a rough approximation of those in §4244, although the appellant never formally moved under that section, perhaps because it involved the risk of temporary confinement in a hospital for the mentally ill. At any rate the trial court considered that its initial task was to decide preliminarily whether it had before it sufficient information to cause it reasonably to believe that the accused might be mentally incompetent to stand trial so that a hearing with the taking of oral testimony was called for. Its decision on this point rested principally on the report of Dr. Brock, the appointment of whom the parties accepted in lieu of a psychiatrist and who made a report on the neuro-psychiatric phases of the case. In view of the procedure followed we have also considered other evidential matter offered to the trial court by the defendant. It consisted only of affidavits by the defendant and by his counsel stating that the accused had suffered a loss of memory. The only medical testimony touching upon the subject by any of the defendant's own private doctors was the last minute report from Dr. Myers who said,

> "His mental and physical condition makes proper consultation with his counsel in the preparation of his case extremely difficult and very likely fruitless."

What purports to be Knohl's affidavit states that he had difficulty in remembering accurately anything connected with the facts of the present case. To offset the fact that he made innumerable other statements in the affidavit which obviously required the exercise of a competent memory, he says that he didn't prepare the affidavit and that it only "seems to be an accurate representation of the facts." The affidavit of counsel said the defendant's memory was very poor and made preparation for trial and consultations with counsel "almost an impossible task." Dr. Myers' report was entirely conclusory and fur-

nished no factual basis whatever for his assertion that Knohl's mental condition made "proper consultation with his counsel in preparation of his case extremely difficult . . ." The affidavits and Dr. Myers' report are not sufficient to require the trial judge to hold a hearing with oral testimony on the issue of mental incompetency to stand trial. Dr. Brock's report, dated June 14, 1966, reiterated the neuro-psychiatric opinion rendered by him on May 10, 1966 in which he said that Knohl was "well oriented, alert and responsive and his behavior for the most part is normal (except for the occasional over emotional episode)" and "gave no evidence of reduction in his ordinary intellectual capacities." In the second report Dr. Brock said, "I believe he is able to stand trial." Where the defendant complains of nothing more than memory difficulties, there is inadequate ground for holding an accused incompetent to stand trial. There was, therefore, insufficient evidence in this case to require a hearing as to the defendant's mental incompetence to stand trial and the court below was not in error in denying the defendant's motion for a hearing. *Hawks* v. *Peyton*, 370 F. 2d 123, 125 (4 Cir. 1966); *United States* v. *Wilkins*, 334 F. 2d 698, 703 (6 Cir. 1964); *Caster* v. *United States*, 319 F. 2d 850, 852 (5 Cir. 1963).

With regard to the appellant's claim that he was physically incapable of standing trial and that he was unable properly to assist his counsel in the preparation of the case and in the trial itself, the trial court was presented with affidavits and reports of physicians which showed that the accused, just prior to the trial, was suffering from serious illness and some physical incapacity. Defense counsel, because of this, requested that the case be continued until the following September. A motion for continuance based on a claim of *physical* disability does not come within 18

U. S. C. §4244 or the procedures therein prescribed.[5] See *United States* v. *Armone, supra.* A procedure was adopted, however, by the agreement of the parties and with the approval of the court, which called for re-examination of the accused by Dr. Brock, who reported that Knohl was able to testify. Knohl's personal physicians were of the opinion that the strain and stress of a trial would be likely to bring about another stroke and thus endanger the life of the accused. They continued to adhere to this view in spite of Dr. Brock's conclusions. At the end of his report Dr. Brock had agreed that Knohl's ability to testify, without dangerous consequences was the central and determinative medical problem, and he made the recommendation that this question should be passed upon by an expert in cardiovascular disease and hypertension. Knohl's personal physicians agreed. The Government and the defense then adopted the procedure of requesting the trial judge to appoint such an expert, and Judge Croake appointed Dr. Clark. Judge Murphy, in considering, some days later, whether a hearing should be held with the taking of oral testimony was justified in believing that this action by the parties and the doctors implied that the physicians them-

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[5] The construction of §4244 is disjunctive, i.e., that inability to properly assist in his own defense is enough to prevent one from going to trial even without a finding that he is unable to understand the proceedingr against him. But cf. *United States* v. *Sermon*, 228 F. Supp. 972, 980 (W. D. Mo. 1964). Its language makes it clear, however, that Congress was concerned solely with the question of mental incompetence; the section only comes into play when the defendant is "so mentally incompetent as to be unable to . . . properly assist in his own defense." See 1949 U. S. Code Cong. Serv. 1928. See also 18 U.S.C. §4246, providing that, "whenever the trial court shall determine in accordance with [§4244] that an accused is or was mentally incompetent, the court may commit the accused to the custody of the attorney general . . . until the accused shall be mentally competent to stand trial . . ." Commitment procedures, of course, are not relevant to the question of physical infirmity.

selves did not believe that they possessed the necessary qualifications to reach a determinative opinion on this crucial point. Dr. Clark reported that Knohl's state of health did not preclude his standing trial. The defense did not offer evidential material or reports from any other medical expert whom they claimed had comparable qualifications on the principal question with those of Dr. Clark. None of the defendant's personal physicians gave an opinion as to Knohl's ability to assist counsel in his defense except for the last minute letter from Dr. Myers, whose report was, in this regard, entirely conclusory, supported by nothing and couched in language strongly suggestive of the promptings of counsel.

We believe it will usually be the better course, where there is reasonable ground to believe that physical disability may prevent a proper defense or endanger the life of a defendant, for the trial court to hold an evidentiary hearing as close to trial as practical. Such a procedure will allow cross-examination of the examining doctors and preserve a full record. This is particularly true in a multi-judge court where, as here, the issue may present itself for determination before four different judges in little over a month. However, we cannot say, in the light of the procedures agreed upon by the Government and the defense and the nature of the evidential material submitted to Judge Murphy, that he abused his discretion in denying the motion for such a hearing. Cases are indeed scarce in which a reviewing court has found an abuse of discretion on the part of a trial judge who has ruled upon an accused's claim that he was *physically* incompetent to stand trial. The judge's own observation of the accused and the opportunity to adjust the trial itself to needs of one suffering physical disability by shortening court sessions, affording the accused periods of rest and having present such medical and nursing aids and attendants as may be needed, give particular cogency to the trial court's estimate of the circumstances and to its disposition of the matter.

On review, this court with the advantage of hindsight, is fully persuaded that Judge Murphy's disposition of the motion was correct. The trial actually took six trial days instead of the three weeks or approximately 15 trial days estimated by defense counsel. The record, from the time the trial started to its conclusion, is barren of any instance which indicated that the appellant was suffering any ill effects from the trial or was unable to assist his counsel in his defense. There was no request for a recess or rest period and no extra time sought for consultation. Defense counsel had claimed at the motion for a hearing that he himself was in precarious health and that if forced to conduct the trial he would do so only at the risk of his own life and would, therefore, resign as counsel rather than go forward. *Mende* v. *United States*, 282 F. 2d 881, 884 (9 Cir. 1960); *Stein* v. *United States*, 271 F. 2d 895 (9 Cir. 1959). He did, however, continue to represent the accused throughout the trial and, like the accused, apparently survived it without suggestion of physical collapse or untoward consequences.

The prosecution's case was based largely upon the evidence given by Mrs. Fuller and it is in the attack on her testimony that a lack of assistance by the accused to his counsel would most likely appear. She was cross-examined for two days by defense counsel, covering 350 pages of the transcript. It was searching and complete and indicated that defense counsel was thoroughly familiar with the events involved in the case. An abuse of discretion will call for a reversal only where there is a showing that the defendant's ability to defend himself was substantially impaired. *United States* v. *Ellenbogen*, 365 F. 2d 982, 985 (2 Cir. 1966), *cert. denied* 386 U. S. 923 (1967). We are aware that the record in itself does not always fully reveal whether an accused was substantially denied a fair opportunity to prepare and conduct his defense. There may have been other evidence or sources of evidence disclosed or

other theories which would have suggested themselves, but the appellant mentions no specific instance where some line of inquiry or development of theory of substantial importance to the defense was baulked or frustrated because counsel could not get assistance from the accused. Moreover, there is nothing from which such injury can be inferred. Cf. *Avery* v. *Alabama*, 308 U. S. 444 (1940); *United States* v. *White*, 324 F. 2d 814 (2 Cir. 1964). We are satisfied that we would be unwarranted under the circumstances of this case to hold that Judge Murphy abused his discretion in denying the appellant a hearing with oral testimony on the question of his mental and physical capacity to stand trial and assist counsel in his defense.

Knohl also appeals from the admission of certain evidence. The first concerns testimony of Mrs. Fuller about a conversation she had with Knohl on October 8, 1965 in which, in substance, Knohl asked her to cash for him twenty additional $100,000 Treasury bills; and told her that he had two or three million dollars worth of securities all of which, including the twenty Treasury bills, came from the same source as the six which she had already cashed. Defense counsel objected on the ground that this injected into the trial, evidence "of a series of other crimes in which Knohl was allegedly involved, bearing no relation to the issues presented." After his objection was overruled, he made motions to strike and for a mistrial, which were also overruled.

On the admissibility of evidence of prior offenses the Supreme Court in *Spencer* v. *Texas*, 385 U. S. 554, 560 (1967) summarized the rule as follows:

> "Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent, *Nye & Nissen* v. *United States*, 336 U. S. 613, *Ellisor* v. *State*, 162 Tex. Cr. R. 117, 282

S. W. 2d 393; an element in the crime, *Doyle* v. *State*, 59 Tex. Cr. R. 39, 126 S. W. 1131; identity, *Chavira* v. *State*, 167 Tex. Cr. R. 197, 319 S. W. 2d 115; malice, *Moss* v. *State*, 364 S. W. 2d 389; motive, *Moses* v. *State*, 168 Tex. Cr. R. 409, 328 S. W. 2d 885; a system of criminal activity, *Haley* v. *State*, 87 Tex. Cr. R. 519, 223 S. W. 202; or when the defendant has raised the issue of his character, *Michelson* v. *United States*, 335 U. S. 469; *Perkins* v. *State*, 152 Tex. Cr. R. 321, 213 S. W. 2d 681; or when the defendant has testified and the State seeks to impeach his credibility, *Giacone* v. *State*, 124 Tex. Cr. R. 141, 62 S. W. 2d 986."

Although these citations are largely to Texas authorities, the footnote appended to this portion of the Supreme Court opinion says:

"7. These Texas cases reflect the rules prevailing in nearly all common-law jurisdictions. See generally McCormick, Evidence §§157-158 (1954); 1 Wharton's Criminal Evidence §§221-243 (Anderson ed. 1955); 1 Wigmore, Evidence §§215-218 (3d ed. 1940 and 1964 Supp.); Note, Other Crimes Evidence at Trial, 70 Yale L. J. 763 (1961) . . ."

This court has frequently had occasion to rule accordingly. *United States* v. *Bozza*, 365 F. 2d 206 (2 Cir. 1966); *United States* v. *Marquez*, 332 F. 2d 162 (2 Cir. 1964); *United States* v. *Kahaner*, 317 F. 2d 459 (2 Cir. 1963).

Even in cases in which the evidence is offered to prove one of the enumerated exceptions to the general rule, its probative value may be very slight while its prejudicial character may be very strong. Under such circumstances the trial judge has a duty in the exercise of his discretion, to exclude it. *Spencer* v. *Texas, supra* at 561; *United States* v. *Byrd*, 352 F. 2d 570, 574 (2 Cir. 1965). The present case is not of that kind. Although the appellant asserts that the

evidence objected to and the Government's references to it in its argument were inflammatory to the jury and highly prejudicial, we are not persuaded that this was so. Moreover, we hold that the evidence was properly admitted. In the first place the testimony was directly relevant to the circumstances concerning the source of the Treasury bills and the likelihood that Knohl knew that they were stolen. In the second place, it indicated that Knohl was a large-scale dealer in stolen securities and that he therefore had a very strong motive to induce Mrs. Fuller not to disclose that he was the source of the Treasury bills and to persuade her to perjure herself before the Grand Jury. *United States* v. *Marchisio*, 344 F. 2d 653 (2 Cir. 1965);[6] *United States* v. *Kahaner, supra.* Any prejudice the defendant may have suffered from this evidence was more than compensated for by the court's charge which was altogether too favorable to the defendant because it, in effect, told the jury to disregard the testimony of Knohl's possession of other securities.[7]

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[6] In the *Marchisio* case the defendants had been involved in embezzlement schemes and were indicted and tried for perjury, for making false statements to federal agents and for conspiring to do both. In discussing testimony about their earlier diversion of funds, the court said, "The fact that the appellants . . . participated in . . . [a scheme to divert funds], in view of their denial of such an arrangement, would provide a motive for these same persons also to participate in conspiracies subsequent . . . [to the diversion of funds], to conceal that venture." 344 F. 2d at 667.

[7] "I have been asked by the defendant to charge you with reference to testimony in the case that relates to Knohl's possession of other securities. With reference to such testimony, such possession of such securities, if you accept that testimony, is no proof whatsoever that the defendant committed the crime charged in this indictment and, also, the testimony that there was some kind of a tax lien by the Government against him, of course, has no bearing on the ultimate question. Such testimony is not proof in any manner or form that he committed the crime of which he stands accused."

The appellant also argues that the admission into evidence, as Government's Exhibit 48, of what is referred to as the "Brodsky tape"—a tape recording made on August 25, 1965 by Mrs. Fuller, without appellant's knowledge, of a conversation in her apartment between herself, the appellant and Attorney Brodsky—was reversible error. Mrs. Fuller testified that she had placed the microphone in her living room and the recorder, to which it was attached, in another room. When she heard the appellant ring her doorbell she started the machine, so that all of the conversation which took place in the living room on that occasion was recorded.[8] The evidence showed that Mrs. Fuller took the tape recording to Agent Goss at the F. B. I. offices on September 10, 1965, where she permitted him to make a copy of it by playing it to another tape recorder. The original tape was taken away by Mrs. Fuller, because she refused to relinquish possession of it. It was agreed, however, for security purposes, to place the recording in a safe deposit box, supplied by the F. B. I. but to which Mrs. Fuller kept the only keys. About a week later, at Agent Goss's request, Mrs. Fuller brought the tape once again to his office for the purpose of making another copy by a method which would eliminate background copying noises. The attempt was abortive because the F. B. I.'s equipment was faulty and the tape was returned to Mrs. Fuller, who took it home. In March of 1966, when Mrs. Fuller was requested to return with the tape recording of the August 25th conversation, she was unable to find it. She testified that she did not destroy it or throw it away and that she had no knowledge of what happened to it. Government Exhibit 48 was a copy

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[8] On cross-examination, Mrs. Fuller testified that she had erased the conversation recorded on August 25th from a few feet of the tape and talked over it, that is, recorded an irrelevant statement of her own onto the erased space. The reason she gave for doing so was that the portion erased was "some personal remark" which was "some insignificant conversation" and "not important."

made from the September 10, 1965 copy, and identical in all respects except that it had been filtered to eliminate background noises.

The appellant claims that Exhibit 48 was inadmissible because it violated the best evidence rule and because it was not authenticated.

Where a re-recording of a tape recorded conversation is offered in evidence and the trier finds that a proper foundation has been laid for it, and that the re-recording is authentic and accurate, a technical and rigorous application of the best evidence rule makes no sense and is not required. *Johns* v. *United States*, 323 F. 2d 421 (5 Cir. 1963). The discussion of the rule by Mr. Justice Sutherland, sitting as a Circuit Justice in the Second Circuit, in *United States* v. *Manton*, 107 F. 2d 834, 845 (2 Cir. 1939) is pertinent:

> "The rule is not based upon the view that the so-called secondary evidence is not competent, since, if the best evidence is shown to be unobtainable, secondary evidence at once becomes admissible. And if it appear, as it does here, that what is called the secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition, reasonably, is not to be feared, the reason upon which the best evidence rule rests ceases, with the consequence that in that situation the rule itself must cease to be applicable, in consonance with the well established maxim—cessante ratione legis, cessat ipsa lex. An over-technical and strained application of the best evidence rule serves only to hamper the inquiry without at all advancing the cause of truth."

We are not unmindful, however, that tape recordings are susceptible to alteration and that they often have a persuasive, sometimes a dramatic, impact on a jury. It is

therefore incumbent on the Government to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings; and where the court accepts them as authentic and accurate but the evidence is conflicting on these points, it must caution the jury to scrutinize the evidence with care.

In the present case there was very substantial evidence of authenticity and accuracy in the testimony of Mrs. Fuller and Attorney Brodsky, supplemented by the testimony of F. B. I. Agent Goss. No contradictory evidence was offered by the defense except what was brought out on cross-examination. Its attack consisted mainly of arguments of counsel suggesting large scale skulduggery on the part of the Government's witnesses in altering the tapes. The appellant also complains that the copy was defective because background noises were filtered out without determining whether or not at the same time low pitched voices were removed and that portions of the recording were missing; but the fact that part of a tape recording is missing or inaudible does not render it inadmissible. See, *Addison* v. *United States*, 317 F. 2d 808, 815 (5 Cir. 1963); *United States* v. *Schanerman*, 150 F. 2d 941 (3 Cir. 1945); *Monroe* v. *United States*, 234 F. 2d 49, 55 (D. C. Cir.), *cert. denied* 352 U. S. 873 (1956). The question of whether so much of a tape recording is inaudible or the circumstances surrounding it are so suspicious and make it so untrustworthy that it should not be admitted into evidence in the first place is addressed to the discretion of the trial Judge. See *United States* v. *Madda*, 345 F. 2d 400, 403 (7 Cir. 1965); *Johns* v. *United States*, 323 F. 2d 421 (5 Cir. 1963); *Gorin* v. *United States*, 313 F. 2d 641, 652 (1 Cir. 1963); *Cape* v. *United States*, 283 F. 2d 430, 435 (9 Cir. 1960); *Monroe* v. *United States*, *supra* at 55; *United States* v. *Schanerman*, *supra* at 944. In the present case the trial judge, after hearing the parties on the defendant's objection, admitted the tape into evidence. He did not thereby

commit an abuse of discretion. Thereafter the jury, after hearing testimony and arguments relative to the reliability and accuracy of the tape and under proper instructions from the court, reached its own conclusion on that issue. The jury obviously believed the explanations given by the Government's witnesses, which it had a right to do.

Moreover, as far as the best evidence rule is concerned, a well recognized exception is that secondary evidence may be admitted in lieu of the original provided the original has not been lost, destroyed or become unavailable through the fault of the proponent and provided the copy does not otherwise appear to be untrustworthy. See *Sylvania Electric Products, Inc.* v. *Flanagan*, 352 F. 2d 1005 (1 Cir. 1965); McCormick, Evidence §196 (1954); 4 Wigmore, Evidence §1192 (3d ed. 1940). In the present case the unavailability of the original was established through the testimony of Mrs. Fuller and there was ample evidence to support the finding that it was not the Government, who was the proponent, that was at fault in the loss of the original, but Mrs. Fuller herself.

The appellant asserts that the Government was so grossly negligent in leaving the tape in Mrs. Fuller's custody that its loss should be held to be the fault of the Government. The tape belonged to Mrs. Fuller and she insisted on keeping it. Under the circumstances the Government had no duty to bring process against the witness who had fully and freely responded to interrogation and on whom it chiefly relied in proving its case, any more than it had a duty to have her held in a lock-up as a material witness.

While the Government's procedures for insuring the safekeeping of the tape were hardly adequate, the trial court was not in error in refusing to exclude the Brodsky tape on any of these grounds.

The appellant further claims that the Government had a duty to disclose to him prior to trial the existence of the tape recordings, particularly the "Brodsky" tape, and, because it failed to do so, his conviction should be reversed.

On May 24, 1966 the defendant had moved under Rule 16 of the Fed. R. Crim. P. for discovery. The trial court granted the motion, but at that time the defendant neither knew of the existence of the tape recordings nor could he have had them disclosed under Rule 16, as it was then worded,[9] even if he had known about them. *United States* v. *Murray*, 297 F. 2d 812, 820 (2 Cir.), *cert. denied* 369 U. S. 828 (1962); *Shores* v. *United States*, 174 F. 2d 838, 843 (8 Cir. 1949).

Under the amended rule, which became effective July 1, 1966, an accused can apply to the court under 16(a)(1)[10] for leave to inspect and copy tape recording of his own statements, in the possession of the Government,[11] and it rests in the discretion of the trial judge whether or not disclosure should be ordered. Though the new Rule 16(a)(1) may be applied to pending cases, the defendant

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[9] "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

[10] "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government . . ."

[11] See Notes of the Advisory Committee on Rules, printed in 8 Moore, Federal Practice ¶16.07[2] (1966). The notes to the new version of Rule 16 [i.e., 16(a)] state that "the defendant is not required to designate [which statements of his he seeks] because he may not always be aware that his statements or confessions are being recorded."

made no further motion after its effective date.[12] In any event, he was in no way prejudiced by not having the opportunity to inspect and copy the recordings in advance of trial, because his counsel received them several days before their introduction into evidence to allow him to meet or attack their admissibility in whatever way he deemed necessary.[13] We find no error based upon appellant's claim that the Government wrongfully failed to disclose or produce.

The appellant also seeks a reversal on the ground that he was deprived of rights protected by the Fourth, Fifth and Sixth Amendments by the admission into evidence of surreptitious recordings of statements made by him to Mrs. Fuller after September 10 and 17, 1965. His argument rests, *inter alia*, on the contention that, after Mrs. Fuller's Grand Jury testimony and no later than the dates on which she played her tape recordings of his statements for the F. B. I., he became the "target of an investigation" and was entitled to be advised of his rights to be silent and to have the presence of counsel before any statements he made could be used against him. He adds that, at least

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[12] In promulgating the Rules, the Supreme Court issued the following order:

> "That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter comenced and so far as just and practicable all proceedings then pending."

383 U. S. 1089 (1966).

[13] During the first day of the trial Mrs. Fuller's testimony disclosed the existence of the tape recordings. Both the recordings and the transcripts of them were turned over to appellant's counsel for his inspection. After the first two days of trial (Wednesday and Thursday) the court adjourned the case until Monday, so that he could spend Friday and the week-end listening to the tapes. Trial resumed on Monday, but it was not until Wednesday, July 13, that the tapes were played for the jury, by which time counsel for appellant had ample time to consider and act on the material presented.

after September 17th, Mrs. Fuller was somehow acting in the capacity of a Government "agent."

These arguments have little force, however, because the Supreme Court's recent decision in *Hoffa* v. *United States,* 385 U. S. 293 (1966) makes it clear that its holdings in *Miranda* v. *Arizona,* 384 U. S. 436 (1966); *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and *Massiah* v. *United States,* 377 U. S. 201 (1964), were never intended to go so far. See also *United States ex rel. Molinas* v. *Mancusi,* 370 F. 2d 601 (2 Cir. 1967), *cert. denied* 35 U. S. L. W. 3343; *Hurst* v. *United States,* 370 F. 2d 161 (5 Cir. 1967).

In the *Hoffa* case the defendant's similar Fifth Amendment claim was rejected for a reason that applies with equal force here and that is that "a necessary element of compulsory self-incrimination is some kind of compulsion," 385 U. S. at 304, a factor which is completely lacking in the present case. Even if Mrs. Fuller could be considered a Government agent, still without compulsion the privilege against self-incrimination is not violated.

The same authorities make it clear that the Sixth Amendment does not prohibit the use of pre-arrest statements in the absence of counsel even though the agents had enough evidence to make an arrest. *Hoffa* v. *United States, supra; United States ex rel. Molinas* v. *Mancusi, supra; Hurst* v. *United States, supra.*

The Fourth Amendment claim does not, as in *Hoffa,* involve governmental intrusion into a constitutionally protected area, because, as far as we can determine, the testimony and evidence complained of relate to conversations which took place in Mrs. Fuller's apartment. The Fourth Amendment protects conversation only against the "surreptitious eavesdropper"; it does not protect a "wrongdoer's misplaced belief that a person to whom he voluntarily confided his wrongdoing will not reveal it." *Hoffa* v. *United States, supra* at 302; *Lewis* v. *United States,* 385 U. S. 206 (1966). Moreover, the fact that Mrs. Fuller was

surreptitiously recording the appellant's statements by means of a hidden mechanical device did not infringe the appellant's rights, because she thereby "obtain[ed] the most reliable evidence possible of a conversation" in which she was a participant and which she was free to disclose through her testimony—circumstances similar to those in *Lopez* v. *United States*, 373 U. S. 427 (1963). See also *United States ex rel. Molinas* v. *Mancusi*, *supra*, at 602-603; *Hurst* v. *United States*, *supra* at 165.

Equally lacking in merit is appellant's final argument that a conviction under 18 U. S. C. §1503 must be supported by the testimony of at least two witnesses that the assertedly false statement which the appellant sought to procure was in fact false. He asserts that because two witnesses are required to testify to the falsity of testimony in a prosecution for perjury, 18 U. S. C. §1621, and for subornation of perjury, 18 U. S. C. §1622, the same rule should apply to the present case. As the Court of Appeals for the Ninth Circuit concluded in rejecting the same argument in *Catrino* v. *United States*, 176 F. 2d 884 (9 Cir. 1949), the position is untenable because the crimes are essentially different. It is a necessary element of both the crimes of perjury and subornation of perjury that the false testimony be given under oath and it is the falsity of swearing or the formal affirmation which must be established by the testimony of two credible witnesses or one such witness plus corroborating circumstances. See *Weiler* v. *United States*, 323 U. S. 606 (1945); *Hammer* v. *United States*, 271 U. S. 620 (1926). Section 1503, however, punishes merely the endeavor to obstruct justice; it is not necessary that the defendant succeed in his attempt for a conviction to be sustained. See *United States* v. *Russell*, 255 U. S. 138, 143 (1921); *Roberts* v. *United States*, 239 F. 2d 467, 470 (9 Cir. 1956); *Catrino* v. *United States*, *supra* at 886.

The judgment of conviction is affirmed.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of June, one thousand nine hundred and sixty-seven.

Present: HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY KNOHL,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circit, held at the United States Court House, in the City of New York, on the seventeenth day of July, one thousand nine hundred and sixty-seven.

Present: HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY KNOHL,
Defendant-Appellant.

A petition for a rehearing together with a motion, in the alternative, to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court, and for other and further relief, having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition for a rehearing be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed pursuant to and subject to the provisions of Rule 28(c) of the rules of this Court.

A. DANIEL FUSARO,
Clerk.

APPENDIX D

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. ...., October Term, 1967

LARRY KNOHL,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including 15 September, 1967.

/s/ ABE FORTAS
Associate Justice of the Supreme Court of the United States

Dated this 11th day of August, 1967.

APPENDIX E

Statutory and Constitutional Provisions Involved

United States Constitution, Fourth Amendment

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fifth Amendment

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously as-

certained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistant of Counsel for his defense.

Title 18 U.S.C. Section 1503

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing maigstrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

Appendix E—Statutory and Constitutional Provisions Involved.

Title 18 U.S.C. Section 4244

§ 4244. Mental incompetency after arrest and before trial

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged;

such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686.

D. C. Code, Section 24-301

§ 24-301. Commitment of persons of unsound mind to the District of Columbia General Hospital—Certification to the court—Acquittal by jury on grounds of insanity—Confinement in a menital institution—Conditions for release after confinement—Conditional release—Expenses—Writ of habeas corpus—Inconsistent provisions of Federal Statutes superseded.

(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hosupital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court,

after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

(b) Whenever an accused person confined to a hospital for the mentally ill is *restored* to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

Title 28 U.S.C. Section 2255

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon,

determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

Federal Rules of Criminal Procedure, Rule 16(a)

Rule 16 Discovery and Inspection

(a) *Defendant's Statements: Reports of Examination and Tests:*

Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or

photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

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281-910—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 608

LARRY KNOHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A28) is reported at 379 F. 2d 427.

JURISDICTION

The judgment of the court of appeals (Pet. App. A29) was entered on June 22, 1967. A petition for rehearing (Pet. App. A30) was denied on July 17, 1967. By order of Mr. Justice Fortas (Pet. App. A31), the time for filing a petition for a writ of certiorari was extended to and including September 15, 1967. The petition for a writ of certiorari was filed on September 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly ruled that petitioner was able to stand trial.

2. Whether tape recordings, including a copy of a lost tape, of conversations between petitioner and a witness, originally made by the witness upon her own initiative, were properly admitted in evidence to corroborate oral testimony that petitioner endeavored to obstruct the due administration of justice.

3. Whether the government was required to make such recordings available to petitioner in advance of trial in the absence of an appropriate motion under Rule 16(a), F. R. Crim. P.

4. Whether the admission of such recordings in evidence violated petitioner's rights under the Fourth and Fifth Amendments.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of unlawfully endeavoring to influence a witness under grand jury subpoena, in violation of 18 U.S.C. 1503. He was sentenced to imprisonment for a period of five years (1 R. 5, 116–117). The court of appeals affirmed.

1. *Testimony tending to show petitioner's endeavor to suborn perjury.*

In August 1965, petitioner asked Mrs. Fuller, with whom he had been dealing on another matter, to negotiate, for a commission, some $100,000 in Treasury bills, payable to bearer. He stated that he could not do this himself, as the government had a $7,000,000 tax

lien against him. He suggested that she obtain a loan on them from her bank, telling the officers that the bills had been given to her by Cyril O'Neil, a Cleveland industrialist, now dead, with whom her former employer had had business dealings (1 R. 122). Using this approach, Mrs. Fuller negotiated six bills at two banks (1 R. 123–127, 130–137, 356–357). Mrs. Fuller transferred the funds to petitioner through a small New York establishment which discounted the checks and gave the proceeds to petitioner without keeping any records of his involvement (1 R. 126, 246–248, 363–373).

On August 19, officers of the Bankers Trust Company of New York found that six $100,000 Treasury bills among a group deposited by a client were missing. They bore the serial numbers of those negotiated by Mrs. Fuller (1 R. 346–359). On August 24, while Mrs. Fuller was in the Barclay Bank for the purpose of withdrawing $10,000 at petitioner's request, an F.B.I. agent and bank officials told her that the Treasury bills which she had negotiated had been stolen from Bankers Trust Company (1 R. 139–142). Shortly thereafter petitioner told Mrs. Fuller to keep to the O'Neil story, that nothing would happen since dead men tell no tales. At petitioner's instruction, Mrs. Fuller consulted Brodsky, an attorney (1 R. 141–143).

On the following day, August 25, Mrs. Fuller was subpoenaed to appear before the grand jury. Petitioner came to her apartment and again told her to keep to the O'Neil story. At a later conference in Mrs. Fuller's apartment, with Brodsky present, petitioner advised Mrs. Fuller not to change her story of how

she came into possession of the bills (1 R. 144–145). The attorney corroborated this account, testifying that petitioner went over with Mrs. Fuller the testimony she was to give before the grand jury the next day as to how she came into possession of the securities and how she came to know O'Neil (1 R. 327–330).[1]

2. *Electronic recordings corroborating testimony.*

On August 12, 1965, Mrs. Fuller, who had learned something about tape recording in the Army Signal Corps and who "like[d] to play with electronics," purchased a recorder to tape her conversations with petitioner. Her initial recordings were not successful (1 R. 146–148, 184–189, 196–197, 284), but she did obtain recordings of conversations on August 24, 25 and 26 (1 R. 159, 166, 203), using a tape which was capable of recording for a period of four hours. She cut off the tape at the end of the August 24 recording and again at the end of the August 25 recording (1 R. 269–278).

On September 10, on her own initiative, Mrs. Fuller took the August 25 tape to F.B.I. agent Goss. Although Mrs. Fuller was unwilling to surrender the tape to Goss, she did permit him to copy the tape by playing it into the microphone of a second recording machine. She also agreed to have the original tape placed in a safe deposit box at Bankers Trust, retaining both keys but promising not to withdraw the tape without F.B.I. approval (1 R. 190–192). Mrs. Fuller

[1] Both Mrs. Fuller and the attorney testified that the attorney conferred privately with petitioner in an adjoining room and then told Mrs. Fuller that he could not represent her, advising her only to tell the truth before the grand jury (1 R. 145, 331).

subsequently produced recordings of a number of other conversations she had had with petitioner. She testified that all the tapes were complete and untampered with except for one brief passage containing an objectionable personal remark, which had nothing to do with the Treasury bills and which she eliminated by taping her voice over that brief section (1 R. 160–161, 198–200, 266, 268, 291).

The method of re-recording used on September 10 was unsatisfactory because the microphone of the second machine picked up not only the original recording, but additional background noises (1 R. 300–301). A few days later, Goss called Mrs. Fuller and asked her to bring in the tape from the vault, so that he could try to make a copy with better equipment. The attempt to do so was unsuccessful. Mrs. Fuller took the tape, but instead of returning it to the bank, took it to her apartment and placed it in a drawer (1 R. 289, 301). In February or March 1966, upon the advice of the attorney who was then representing her, she took all the tapes of her conversations with petitioner to the F.B.I. In playing them over, it was discovered that the tape that Mrs. Fuller thought contained the August 25 conversation was blank (1 R. 193, 204, 285, 301, 315–316).

A re-recording of the copy which the F.B.I. had in its possession was made in order to filter out background noise. Agen Goss testified that, in the course of the re-recording, both of the original and the first copy, there was no tampering with the tape, and that

the copy was accurate (1 R. 302–306).[2] Mrs. Fuller testified that nothing had been deleted from the original conversations on any of the tapes except the personal remark (*supra*, p. 5). Brodsky testified that, to the best of his recollection, nothing had been added to the August 25 tape and that only a very small percentage of words on the tape were indistinguishable (1 R. 342–343). This second copy and the originals of the August 24 and 25 conversations were, over objection, played to the jury (1 R .231–232, 374–378).

3. *Petitioner's efforts to obtain a continuance.*

Petitioner had a stroke on November 12, 1965. On March 5, 1966, a Dr. Brock, who had been appointed to examine petitioner in connection with an unrelated proceeding in the Eastern District of New York, reported that petitioner was then unable to withstand a trial of several months and should be reexamined in six months (R. 56–59).[3]

On May 9, 1966, petitioner moved for postponement of the trial in this case. Counsel agreed that Dr. Brock should again examine petitioner and report as to his ability to stand trial (1 R. 6–8). After examining petitioner and noting the opinion of petitioner's two doctors, Dolger and Frieden, that a trial would

[2] There was also testimony as to the accuracy of typewritten transcripts of the various conversations (1 R. 151, 203, 303, 320–321, 332). However, the transcripts were not introduced in evidence because of doubts expressed by the court as to their admissibility (1 R. 233–234, 362).

[3] As a result of the stroke, petitioner suffered partial paralysis of the right side and was confined to a wheel chair. There was slurring of speech, although petitioner was able to use words correctly. Petitioner was well oriented, alert and responsive. His behavior was for the most part normal, except for occasional over-emotional episodes.

be hazardous to petitioner's health, Dr. Brock gave it as his opinion that petitioner was able to stand trial. He suggested that a nurse or doctor be present as a precautionary measure. Dr. Brock also reported that petitioner was alert, responsive and cogent in conversation, and that there were signs that petitioner exaggerated his disabilities, claiming symptoms which were "not of organic pattern or origin" (1 R. 64–69).[4]

On June 3, 1966, the case was assigned for trial, with leave to the trial judge to hold a hearing on the question of petitioner's health if he thought it appropriate to do so. (1 R. 30–35). On June 14, Dr. Brock reported to the court that he and Dr. Dolger had made a further examination of petitioner. Dr. Brock adhered to his earlier opinion that petitioner was able to stand trial without dangerous consequences, but he joined with Dr. Dolger in suggesting that an expert in cardiovascular diseases and hypertension make an examination and give his opinion (1 R. 76, 79–81). A Doctor Clark was appointed to conduct the examination (2 R. 19).

Before Dr. Clark's report was received, petitioner's counsel filed on June 28 a lengthy affidavit seeking a continuance. The attorney asserted his own inability to try the case in the summer. He alleged that petitioner was physically unable to stand trial and mentally unable to assist counsel. There were submitted the doctors' reports and letters referred to above, and

[4] In an affidavit submitted in support of a motion for discovery, petitioner stated that his memory and thinking had been impaired by the stroke and medication (1 R. 27–29).

ten letters from various doctors, stating that a trial would be dangerous to petitioner's life, but not discussing any claim of mental incapacity (1 R. 42–83).

Dr. Clark filed an extensive report dated June 29. He concluded that, although any profound emotional experience involved some risk to petitioner's health, it was not an extreme risk, that petitioner's state of health did not preclude his standing trial, and that petitioner was as well then as he was likely to be (1 R. 84–95). Judge Herlands, having heard counsel on June 27 and June 29 (2 R. 11–26), and having conferred with Dr. Clark by telephone, overruled petitioner's application for a continuance in a memorandum decision dated June 30. He placed the case on the trial calendar for July 5, but noted that the trial judge would have discretion to decide whether or not there should be a hearing of medical witnesses (1 R. 96).

On July 5, before Judge Tyler, petitioner's counsel again sought a continuance on grounds of his own health and petitioner's inability to stand trial. The court assigned the case for trial before Judge Murphy (1 R. 100). The request for a continuance was renewed before Judge Murphy supported by a letter of Dr. Myers stating his opinion that a trial would endanger petitioner's life. The doctor said that petitioner's "mental and physical condition makes proper consultation with his counsel in the preparation of his case extremely difficult and very likely fruitless. He [is] a seriously deteriorated individual and the nature of his illness is such that there is little likelihood of future improvement" (1 R. 114–115). In argu-

ment before Judge Murphy, counsel said that he had not been able to consult with petitioner "more than a few times" (1 R. 105). He stressed petitioner's physical difficulties (1 R. 106). He said that the judge "ought to hear the medical testimony" although the doctor who had been treating petitioner was not in the country (1 R. 112). The judge said he would assume that Dr. Myers would testify in accordance with his report but he thought that "there has been enough medical testimony so far" (1 R. 112). Counsel said that he would try to produce Dr. Myers personally on the following day (1 R. 112). Dr. Meyers was not, however, offered as a witness. Trial was commenced on July 6, occupied six trial days and concluded on July 18 (1 R. 3).

ARGUMENT

1. Petitioner's repeated applications for a postponement of the trial from July to September were predicated on the assertion that a trial in July would endanger his health and life. While that assertion was supported by two physicians (Drs. Dolger and Frieden), it was denied by two court-appointed specialists (Drs. Clark and Brock) who reported that there was no inordinate peril in proceeding to trial and that petitioner was as well as he was ever likely to be. It was in this context that four district court judges denied the requested continuance (see 1 R. 96). Up to July 5, 1966—the very date set for trial—none of the medical opinions submitted by petitioner advanced the theory, now relied on, that petitioner's condition precluded adequate consultation with counsel. The submission of a letter from Dr. Myers (1 R. 114) to that effect on July 5 came at a time when, in the

usual course, the work of trial preparation would have been largely completed. Dr. Myers' letter was couched, as the court of appeals noted, in wholly conclusory terms (Pet. App. A13–A14), and in this regard differed markedly from the reports of detailed medical examinations previously received by the court. Then, too, this last minute effort to secure a continuance was in large measure based on an asserted lack of preparation and inability to proceed attributed to counsel's own ill health—a ground on which petitioner no longer relies.[5] Under these circumstances the court of appeals properly concluded that the district court had not abused its discretion in declining to hold an evidentiary hearing on the question of petitioner's mental and physical capacity to stand trial and assist counsel. Moreover, the court of appeals noted that petitioner makes no showing that his defense was in any way prejudiced by the state of his health and the trial

[5] In argument before District Judge Murphy on July 5, 1966, defendant's counsel stated:

"Now I am in this position, first, as you know, I have suffered two heart attacks * * *.

* * * * *

* * * If I have to work now I am afraid of what it will do to my health. I have not been able to prepare the case with this unbearable heat these last four or five days. It is completely impossible.

* * * * *

And I am not ready. I don't know what to tell you. That is the worst part of it, that I am not prepared, nor am I a well enough person to go on with it.

* * * * *

I say out of sympathy and mercy to me alone, let me try it in September."

[1 R. 105–107]

record reveals nothing from which such prejudice might be inferred (Pet. App. A17–A18).

2. The government introduced in evidence a copy of a tape recording (Exhibit 48) of a conversation between Mrs. Fuller and petitioner which took place at Mrs. Fuller's home on August 25, 1965. In the course of that conversation petitioner urged Mrs. Fuller to testify falsely before a grand jury. Petitioner urges that the receipt in evidence of Exhibit 48 violated the best evidence rule since it was a copy of the tape originally made by Mrs. Fuller.

Although, strictly speaking, the best evidence rule is addressed to writings (*Meyers* v. *United States,* 171 F. 2d 800, 812 (C.A.D.C.), certiorari denied, 336 U.S. 912), we do not doubt that electronic recordings may logically fall within the reason of the rule. Nonetheless, the rule requires that the original writing be produced "unless it is shown to be unavailable for some reason other than the serious fault of the proponent." McCormick, *Evidence* § 196 (1954). Here, the record clearly showed that the original of which Exhibit 48 was a copy had been lost by Mrs. Fuller and hence could not be produced. See p. 5, *supra.* Since the original was unobtainable, a copy was admissible under the exception to the rule. *United States* v. *Manton,* 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664.

Petitioner seeks to escape this difficulty by attempting to portray the conduct of the government in the handling of the original tape brought in by Mrs. Fuller as so grossly negligent, or indeed fraudulent, as to require the exclusion of the copy which was made. The record does not support this view. In the first place,

the government had no right to seize this tape when it was brought in to the F.B.I. office on September 10. The tape was Mrs. Fuller's property. The government inspected and copied it with her permission and properly returned it to her on her insistence. The arrangement made for placing the original tape in a safe deposit box was purely a matter of grace on the part of Mrs. Fuller. It is regrettable that she did not replace it in the vault after bringing it to the F.B.I. office the second time. There is however nothing to indicate that she wanted to destroy it. There would be no motive on her part for its destruction since a copy was in the possession of the F.B.I. In any event, she was not acting as agent for the government in her handling of her own tape. There was manifestly no motive for its destruction by the government, which had been at pains to preserve the tape as prime evidence. Moreover, nothing is suggested as to any possible change or omission in the copy which affected the tenor of the conversation made available to the jury. The attorney chosen by petitioner to represent Mrs. Fuller testified that the copy was an accurate record of the conversation (*supra*, p. 6).[6]

[6] *United States* v. *Consolidated Laundries*, 291 F. 2d 563 (C.A. 2), an antitrust case relied upon by petitioner, presented a distinctly different factual situation. There the government subpoenaed certain papers and then lost them during the course of the trial, but later found them. The court of appeals found that the lost evidence would have been helpful to defendant at trial for purposes of cross-examination and that the government had been negligent in letting the evidence get temporarily out of hand. Acting upon considerations of fairness, but without reaching any supposed constitutional issue, the court ordered a new trial. Here the same court has carefully reviewed the

The fact that a further copy was made to be played to the jury, from which high and low frequencies were filtered so as to minimize background noise, has no significance. *Monroe* v. *United States,* 234 F. 2d 49, 56 (C.A.D.C.), certiorari denied, 352 U.S. 873; *Cape* v. *United States,* 283 F. 2d 430 (C.A. 9). Petitioner and his counsel heard all the recordings (1 R. 230) and reported no discrepancies. Under the careful instructions of the court (1 R. 413–414), Exhibit 48 was properly in evidence for the purpose of corroborating the testimony of the witnesses who testified to the conversation of August 25.

3. Present Rule 16, F. R. Crim. P., provides that "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant * * *." Petitioner's contention that this rule imposed an affirmative duty upon the government to come forward and produce the tapes in advance of trial is belied by the language of the Rule, which expressly requires a motion.

It is also apparent on the record that petitioner suffered no prejudice by not having the tapes before trial. Mrs. Fuller testified to their existence on the first day of trial, Wednesday, July 6, 1966. Court was not in session on Friday, July 8, and petitioner and his counsel heard all the tapes on that day (1 R. 230). The tapes were not received in evidence and played

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circumstances, found no prejudice and nothing more than excusable neglect in failing to supervise Mrs. Fuller's return of the tape to the strong box. We submit that there is no occasion for further review of this factual finding.

for the jury until Wednesday, July 13. At no time was there a request that any of them be examined by an expert. Nor was there any request for time to explore any leads suggested by the tapes. No suggestion has since been made of any exculpatory facts which could have been discovered through leads from tapes. The claim of prejudice is without foundation.

4. Finally, petitioner contends that his rights under the Fourth and Fifth Amendments were violated when Mrs. Fuller recorded incriminating conversations with him in her own home and turned the recordings over to the government. Even if it were assumed, contrary to all the evidence, that Mrs. Fuller was acting as an agent for the government, this argument is without merit in light of this Court's decisions in *Hoffa* v. *United States,* 385 U.S. 293; *Osborn* v. *United States,* 385 U.S. 323; *Lewis* v. *United States,* 385 U.S. 206; and *Lopez* v. *United States,* 373 U.S. 427. Petitioner does not show that he was subject to any kind of compulsion. He does not show that there was any trespass or intrusion into a constitutionally protected area. Quite unlike *Berger* v. *New York,* 388 U.S. 41, this is not a case of surreptitious eavesdropping. Petitioner intended Mrs. Fuller to hear him when he urged her to give false testimony before the grand jury. Clearly nothing in the Constitution required the exclusion either of her testimony as to his statements or of the recording that she made of them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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